Supreme Court, U. S.
FILED
JAN 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-944

TIME, INC.,

Petitioner,

v.

MARY ALICE FIRESTONE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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The petitioner Time, Inc., respectfully prays that a writ of certiorari issue to review the opinions and orders of the Supreme Court of Florida, quashing orders directing entry of judgment for petitioner, and remanding the cause with directions to reinstate the jury verdict and final judgment thereon in favor of respondent.

OPINIONS AND ORDERS BELOW

The opinion and order of the Florida Supreme Court, initially rejecting petitioner's Federal constitutional claims, and remanding the cause to the District Court of Appeal for consideration of state law issues is reported at 271 So. 2d 745 and attached as Appendix A.

The subsequent opinion and order of the District Court of Appeal on remand, holding for petitioner on the state law issues and directing entry of judgment in favor of petitioner, is reported at 279 So. 2d 389 and attached as Appendix B.

The final opinion and order of the Florida Supreme Court, quashing the decision of the District Court of Appeal in favor of petitioner, and remanding the cause with directions to reinstate the jury verdict and final judgment thereon in favor of respondent, is not yet officially reported and is attached as Appendix C.*

JURISDICTION

The order of the Supreme Court of Florida directing final judgment in favor of respondent was entered December 11, 1974, and became final January 11, 1975 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).**

*Opinions and orders of the lower courts, prior to the first opinion of the Florida Supreme Court, are also attached in chronological order as follows: The original opinion of the trial court, granting summary judgment for petitioner, rendered November 15, 1968, and not officially reported, is Appendix D. The opinion of the District Court of Appeal, reversing that grant of summary judgment, 231 So. 2d 862, is Appendix E. The judgment in favor of respondent following trial and jury verdict entered on September 9, 1970, is Appendix F. The opinion and order of the District Court of Appeal, reversing the trial court's judgment in favor of respondent and directing entry of judgment in favor of petitioner, 254 So. 2d 386, is Appendix G. That opinion was followed by the two opinions of the Florida Supreme Court and the intervening opinion of the District Court of Appeal described above in the text.

**This petition also brings before this Court the prior opinion and order of the Florida Supreme Court entered December 20, 1972 (Appendix A), which initially rejected petitioner's Federal constitutional claims. Review of that decision was not previously sought because it was not final for the purpose of this Court's jurisdiction, in that it remanded the cause to the District Court of Appeal for consideration of state law issues. Now that the Supreme Court of Florida has rendered its final judgment—reversing the decision of the District Court of Appeal in favor of petitioner on remand, and directing the entry of final judgment for respondent—this Court has jurisdiction to review the cause, including the prior opinion and judgment of the Florida Supreme Court, under 28 U. S. C. § 1257(3). *Reece* v. *Georgia*, 350 U. S. 85, 87.

Upon application by petitioner the Supreme Court of Florida has suspended remand of the action to the District Court of Appeal until February 10, 1975. The Supreme Court of Florida has refused further to suspend remand pending decision by this Court on petitioner's petition for certiorari. For that reason, petitioner will separately apply to this Court for an order directing the Supreme Court of Florida to suspend remand and entry of a mandate to the District Court of Appeal pending decision of this Court on this petition for certiorari.

QUESTIONS PRESENTED

1. Was the Supreme Court of Florida in error under the First Amendment because it imposed liability without fault with respect to a routine news item reporting a judicial decision accurately, carefully and competently?

2. Was petitioner's news item a rational interpretation of an ambiguous judicial opinion and thus entitled to First Amendment protection so that failure of the Supreme Court of Florida to affirm dismissal of the action was error?

3. Was the Supreme Court of Florida in error because of its failure (a) to impose an "actual malice" standard of proof under the First Amendment upon a plaintiff who had instituted and been drawn into a particular public controversy which commanded a substantial amount of independent public interest and who brought suit with respect to a routine news item reporting accurately, carefully and competently a judicial decision that was given nationwide coverage because of the prominence of the parties involved in that particular public controversy, and (b) under that standard to affirm dismissal of the action?

4. Did respondent's explicit withdrawal of any claim for damage to reputation arising from a routine news item reporting a judicial decision make mandatory imposition of an "actual malice" standard of proof under the First Amendment so that the failure of the Supreme Court of Florida to impose that standard and affirm dismissal of the action was error?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., amend. I.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner is the publisher of the weekly newsmagazine, *TIME*. Respondent brought this action for libel based on an item which appeared in the Milestones section of *TIME*

dated December 22, 1967, but which closed on Saturday, December 16, 1967, concerning a decision of the Circuit Court, Palm Beach County, Florida, rendered December 15, 1967. The item stated as follows: (Pl. Ex. 1)

> "Divorced. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'"

The decision thus reported was rendered on Friday, December 15, 1967, at 4:39 p.m. At 6:52 p.m. that evening petitioner received an AP dispatch which, in pertinent part, read as follows: (Def. Ex. 1)

> "WEST PALM BEACH, Fla. AP—Millionaire industrial heir Russell A. Firestone Jr. was granted a divorce Friday from his third wife, a former West Palm Beach school teacher he had accused of adultery and extreme cruelty."

Later that evening petitioner received the New York Daily News for December 16, 1967, which, in pertinent part, read as follows: (Def. Ex. 3)

> "West Palm Beach, Fla., Dec. 15 (Special)—The stormy, scandal-ridden divorce trial of millionaire Russell A. Firestone Jr. ended today when the rubber and oil heir was granted a divorce from his third wife, a statuesque onetime West Palm Beach schoolteacher, who had been accused of adultery."

On December 16, 1967, in response to a query sent to petitioner's Miami bureau, petitioner received a dispatch at 11:52 a.m. from Richard Duncan, head of that bureau, which in pertinent part, read as follows: (Def. Ex. 2)

> "... Judge James Knott commented: 'According to certain testimony in behalf of the defendant (Russell), extra marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in the plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr.'"

Finally, at 1:25 p.m. on December 16, 1967, petitioner received a dispatch from Robert Delaney, Palm Beach "stringer" working on a special assignment basis, which, in pertinent part, read as follows: (Pl. Ex. 4)

> "... The technical grounds for divorce according to Joseph Farrish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery. . . ."

Based on those two items and two dispatches, the *TIME* editorial team, consisting of Ursula Nadasdy, researcher, William Doerner, writer, and George Daniels, Sr. Editor in charge of the Milestones section of *TIME* magazine, wrote, edited and checked for accuracy the item on which suit was brought. All testified at the trial as to their complete belief in the truth of the news item both at the time of the publication and at the time of the trial (Tr. pp. 191, 230, 232, 235, 237, 269, 272, 274, 298, 328, 329, 376-79).

The actual opinion in *Firestone* v. *Firestone,* on which report was made in *TIME's* Milestones item but which the editorial personnel had not seen prior to publication, is

essentially the same as the two news items and two dispatches on which the *TIME* item was based. If one excludes those portions of the opinion which merely give the fact of marriage and residence, deal with financial disputes between the parties or cite authority, the opinion reads as follows: (Pl. Ex. 2)

> "This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), *the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery,* and the wife's answer thereto setting up certain affirmative defenses. . . ." (Italics added)
>
> ". . . .
>
> "According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testin ony, in plaintiff's behalf, would indicate that defen lant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount most of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated. . . ."
>
> ". . . .
>
> "In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.
>
> ". . . .

"ORDERED AND ADJUDGED as follows:

"1. That the equities in this cause are with the defendant; *that defendant's counterclaim for divorce be and the same is hereby granted,* and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved." (Italics added)

". . . .

"4. That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff."

This action was commenced March 12, 1968, based on respondent's contention—squarely belied by the express statements in the divorce court's opinion that the husband's "counterclaim for divorce on grounds of extreme cruelty and adultery" was "hereby granted"—that she had not lost the divorce case on the ground of adultery and, for that reason, her reputation had been damaged.* Based on the facts above stated, petitioner moved for summary judgment on First Amendment grounds (as made applicable to the States by the due process clause of the Fourteenth Amendment**). That motion was granted by the trial court on

*Long after the publication in 1967 and the commencement of this action in 1968, the divorce decree was upheld on appeal. The District Court of Appeal affirmed without opinion in 1971, 249 So. 2d 719. The Supreme Court of Florida also affirmed in 1972, but with modifications, stating in its opinion that "lack of domestication" was not a ground for divorce, but that the decree could be sustained on the ground of "extreme cruelty", and gratuitously adding that the trial court had not found the wife guilty of adultery. 263 So. 2d 223.

**In its answer to the complaint petitioner asserted that the publication in suit was protected by the constitutional guarantees of freedom of the press embodied in the First and Fourteenth Amendments; these Federal constitutional claims were properly preserved and passed upon as noted in the text which follows above.

November 15, 1968, on the ground that "defendant's thorough investigation of the facts, prior to publication of the article conclusively shows a lack of malice or recklessness" (Appendix D). The District Court of Appeal reversed on January 26, 1970 (231 So. 2d 862, Appendix E), on the ground that summary judgment was not available as a procedural device in Florida where state of mind was an issue.

Final preparation for trial was then begun with two significant occurrences. First, the trial court, despite proof of the prominent press coverage which respondent and her marital litigation had received, ruled that no constitutional issue was presented. Second, after it became apparent that petitioner was going to vigorously meet the issue of damage to respondent's reputation, respondent was allowed to withdraw her claim for damage to reputation and to proceed "simply on the mental pain and anguish of Mrs. Firestone". The trial then proceeded, with all First Amendment objections renewed and reserved throughout, and resulted in a verdict of $100,000 for respondent with a significant finding that no punitive damages would be allowed.

On a second appeal to the District Court of Appeal that Court reversed on four common law grounds and, also, on the basis of the First Amendment, stating with respect to the latter (254 So. 2d at 389-90, Appendix G):

> "Time testified as to the elaborate procedures undertaken to ensure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth. . . . It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circum-

> stances. If the press were charged with correctly analyzing the legal intricacies of each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it."

The Court's holding was grounded on its conclusion "that the divorce of Mary Alice Firestone was an event of great public interest"; it noted that she was possibly "a public figure" but said "we need not go that far to substantiate our result." (*Ibid.*)

The Supreme Court of Florida granted certiorari and reversed (271 So. 2d 745, Appendix A) solely on the constitutional ground. Despite noting that respondent and her husband were "well known" and "prominent", that their divorce action was "a veritable *cause celebre*" which received national news coverage and "was unquestionably news worthy", the Court inexplicably held that reports of the Firestone divorce "were not constitutionally protected as being matters of real public or general concern." The Court did not consider other reasons warranting constitutional protection, such as whether respondent was a public figure, the fact that petitioner's news item was a report of judicial proceedings, and that it was in any event a reasonable interpretation of an ambiguous document. Instead, the Florida Supreme Court remanded the case to the District Court of Appeal for further consideration of the four common law issues. On remand, the District Court of Appeal adhered to its prior decision in favor of petitioner on those issues (Appendix B). The Florida Supreme Court thereupon again granted certiorari and rendered its final decision, reversing and directing the entry of final judgment for respondent (Appendix C). Petitioner accordingly now seeks review of the holdings of the Florida Supreme Court denying its claims to constitutional protection.

REASONS FOR GRANTING THE WRIT

In rejecting petitioner's First Amendment claims the Supreme Court of Florida has decided important questions of press freedom contrary to applicable decisions of this Court. Review is further called for because of the attitude toward the commands of the First Amendment displayed by the Florida Supreme Court in its opinions in this case, and in others. It apparently neither likes nor trusts the press which made necessary the recent decision of this Court in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241. The same result must follow here. If the $100,000 verdict is permitted to stand in the circumstances of this case, the ability of the press to report the news generally, and judicial proceedings in particular, will be gravely impaired.

1. This Court's constitutional decisions in the libel field—beginning with *New York Times* and extending through *Gertz**—make clear that the First Amendment precludes imposing liability without fault. The news item in this case is clearly entitled to First Amendment protection, whether that protection be the more limited shield provided by *Gertz* or the more stringent "actual malice" test of *New York Times* and *Butts.* But whatever the applicable test, the Supreme Court of Florida has exceeded constitutional bounds in imposing liability without fault.

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*For brevity and ease of reading, we shall in this petition refer to past First Amendment decisions of this Court by their shorthand names, *i.e., New York Times, Butts, Gertz,* etc. Decisions so referred to include *New York Times* v. *Sullivan,* 376 U. S. 254; *Garrison* v. *Louisiana,* 379 U. S. 64; *Rosenblatt* v. *Baer,* 383 U. S. 75; *Time, Inc.* v. *Hill,* 385 U. S. 374; *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130; *Greenbelt Cooperative Pub. Ass'n* v. *Bresler,* 398 U. S. 6; *Time, Inc.* v. *Pape,* 401 U. S. 279; *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265; *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29; *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241; *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323.

Moreover, it has done so solely on the basis of its claim that petitioner erred in reporting that respondent was divorced on the ground of adultery—a claim which lacks substance because the news item, despite the garbled rationale of the Florida Supreme Court, stated precisely what the decision it reported had held.

The jury at the trial never passed on the question of petitioner's fault, other than to refuse to award punitive damages and thus endorse petitioner's good faith, for the only issue given to the jury was that of truth. Even the issue of qualified privilege to report judicial proceedings was given to the jury on the basis that the report must be accurate.

The editorial process presented to the trial court and to the Supreme Court of Florida, was clearly proper editorial procedure with respect to a newsworthy item reporting on a judicial decision of considerable public interest. Testimony by Researcher Nadasdy, Writer Doerner and Editor Daniels made that quite clear. The item was written, edited and checked, based upon an AP dispatch and a New York Daily News clipping plus two specific written dispatches from Florida. Those four documents gave precisely the same picture as does the opinion of the trial court in the Firestone divorce case itself, namely, that the divorce was founded both on extreme cruelty and adultery. There is thus no possible negligence, whether with "convincing clarity" or not and, again, no error. The lack of error is also significant in the fact that no retraction was given, a fact repeatedly stressed in argument in the trial court and stressed by the Florida Supreme Court in both of its opinions in this action. How can one retract that which is true? And how does that lack of retraction possibly make any difference whatsoever with respect to a constitutional defense either of lack of negligence or of lack of "actual malice", each of which must be judged by facts prior to

publication and not that which took place after publication. The Florida Supreme Court seemed to be oblivious of this obvious fact.

There is simply no basis, on the facts of this case, for finding that petitioner was negligent or otherwise at fault. As the District Court of Appeal said in its second opinion (254 So. 2d 389-90, Appendix G):

> "Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth."
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> "It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it."

Yet the Florida Supreme Court now disposes of those findings in a single paragraph of its opinion, as follows: (Appendix C, p. C10).

> "Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz* v. *Welch, Inc.*, supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found

> guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of 'journalistic negligence.' "

The Supreme Court of Florida thus found negligence based *solely* on its view that the *TIME* Milestones item was in error. In so doing, it clearly departed from the rule running through all constitutional First Amendment cases commencing with *New York Times* that liability cannot be predicated solely on error. *New York Times,* p. 273, *Garrison,* pp. 73, 75, 78, *Hill,* pp. 387-88, *Greenbelt,* p. 10, *Gertz,* pp. 340-41. And even that claim of error is erroneous, since there was no error. The Supreme Court of Florida seemed unable to grasp the elementary principle that the trial court in the Firestone divorce action did what it was not supposed to do, *i.e.,* it found adultery and also awarded alimony. But the fact that it was not supposed to do that cannot possibly prove that it did not do that, because that was precisely what it did. The fact that the Florida Supreme Court, some five years later, in its final decision with respect to the Firestone divorce case (263 So. 2d 223) upheld the "extreme cruelty" ground of the divorce award (p. 225), which made unnecessary investigation of the "adultery" trial court ground of the divorce award, and gratuitously added that the trial court "did not find the wife guilty of adultery" (p. 225), cannot

change what the divorce court did. That court, faced with a counterclaim for divorce by the husband founded both on "extreme cruelty and adultery", simply stated that "defendant's counterclaim for divorce be and the same is hereby granted"—which can only mean, in plain English, that it found for the husband on both adultery and extreme cruelty. Unless the plain meaning of the English language is to be completely disregarded in the Florida courts, the Florida trial court plainly did what the *TIME* item said it did, and the gratuitous remark in the Supreme Court opinion regarding the basis of the decision can no more change that than it can change black to white, nor can it afford any basis for denying First Amendment protection to petitioner.

2. The holdings below are incompatible with this Court's opinion in *Time, Inc.* v. *Pape,* for a "rational interpretation of an ambiguous document" can no more be the basis for a finding of fault than it can be for a finding of "actual malice". The District Court of Appeal dealt with this matter in its second opinion as follows (254 So. 2d 390, Appendix G):

> "The wording of the divorce decree was ambiguous. At least two reasonable interpretations were available—that plaintiff was found an adulteress as charged in the complaint, or that she was not an adulteress because of the incongruity of such a finding with an award of alimony.
>
> "The testimony at trial, some deemed too spicy for public sessions, implicated both parties in compromises to marital fidelity. The wording of the divorce decree itself would lead a reasonable person to conclude adultery had been committed, '[a]ccording to certain testimony in behalf of the defendant,

extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr.' Part of this language was reproduced exactly in Time's article.

"In addition to Time's rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to substantiate information. Plaintiff's attorney and the judge were called for verification."

In writing the report in this case, the *TIME* personnel had before them an AP dispatch which directly quoted from the language of the final decree describing the plaintiff's "extramarital escapades" (Def. Ex. 1). The same language was quoted in a second dispatch (Def. Ex. 2) and in a newspaper report (Def. Ex. 3) which they had. Adultery is specifically mentioned no less than three times in the dispatches and newspaper stories they had before them (Pl. Ex. 4, Def. Exs. 1, 3). And one dispatch asserted "as fact" that adultery was a ground for the divorce (Pl. Ex. 4).

3. Unless reversed, the holdings of the Florida Supreme Court will make it impossible for the press to report judicial decisions, particularly in any current and meaningful way. This Court has emphasized that "maximum freedom must be allowed the press" in "informing the citizenry of . . . court proceedings . . . " *Estes* v. *Texas,* 381 U. S. 532, at

539, and see also 541-42.* That freedom is nullified by the holdings below.

The Supreme Court of Florida has apparently decreed that a publisher cannot safely report a court decision unless he satisfies all of the following requirements—

—A copy of the decision must be obtained before publication. It is not enough to publish on the basis of descriptions of the decision.

—The decision must be carefully analyzed for inconsistent statements and legal rationale. It is not enough to report what a court said it did. A publisher must report what a court *should* have said it did.

—A publisher must anticipate what a reviewing court, long after the event (five years here), will say a lower court held or should have held.

These requirements are not only absurd—if petitioner had had a copy of the Firestone divorce decision when its Milestones item was written, the item would have been exactly the same, for that opinion expressly granted the husband's counterclaim and stated that the counterclaim was for "extreme cruelty and adultery", and those facts cannot be changed. More importantly those requirements frustrate the public's right to have current and meaningful reporting of judicial decisions. A publisher would be at risk even if he simply printed the full text of the decision. And there would be inordinate delay.**

**See also* the following cases which likewise stress the public's right to be informed about judicial proceedings and the freedom of the press to report those proceedings: *Craig* v. *Harney,* 331 U. S. 367, 374; *In re Oliver,* 333 U. S. 257, 268.

**If petitioner had printed the full text of the divorce court's opinion, instead of its Milestones summary, it would still be liable under the rationale of the Florida Supreme Court. For that decision

Such a stultifying result cannot be squared with the First Amendment and the cited decisions of this Court emphasizing the public's right to be informed of judicial proceedings. Published reports of judicial proceedings, like discussions of public officials and public figures, cannot give rise to liability for defamation unless the defamatory statements are made with "actual malice" in the *New York Times* sense. The First Amendment values which protect discussion of public officials apply with equal force to discussion of judicial proceedings. The opinion in *New York Times* itself strongly suggests that reports of judicial proceedings should enjoy the protection of the "actual malice" standard, at least insofar as the reports concern the conduct of judges. 376 U. S. at 272-73. And Dean Prosser has concluded that the *New York Times* rule applies to the privilege for reporting judicial proceedings, noting that "it seems beyond dispute that even if the report is an inaccurate one, it is privileged unless it is made with knowledge of the falsity or in reckless disregard of its truth." *Prosser on Torts* 832 (4th ed. 1971).

Since it is abundantly clear that petitioner's discussion of the Firestone divorce case was not published with "actual malice", petitioner cannot constitutionally be held liable for any defamation resulting from its publication.

4. Additionally, the result below cannot be squared with this Court's decisions in *Butts* and other cases that public

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conveyed to the public exactly what petitioner reported—that respondent had been divorced on grounds of extreme cruelty and adultery.

Delay is also inevitable. In many instances it will be some time before the exact decision can be obtained. Further delay would result from the need to flyspeck the decision for error. Even in the case of decisions of this Court, such requirements would substantially delay reporting—decisions rendered on a Monday, which are now routinely reported throughout the country on Monday evening or Tuesday morning, could not possibly be reported upon until the end of the week. And even then a publisher would be liable if he printed a decisional error defaming someone.

figures must prove "actual malice" to recover for defamation. Under all relevant tests, respondent was a "public figure". Indeed, the Milestones section in TIME magazine is limited to "important events in the lives of important people" as testified by writer Doerner at the trial (Tr. p. 348). Respondent was "drawn into a particular public controversy" (*Gertz*, p. 351), indeed she initiated it, and "commanded a substantial amount of independent public interest" (*Butts*, p. 154).

The Supreme Court of Florida pointedly ignored this point in its second opinion (Appendix C). In its first opinion it noted the facts making respondent a public figure (271 So. 2d 751, Appendix A):

> "We now review the pertinent facts in this case in the light of the foregoing observations. As noted, petitioner and her ex-husband were well known. They were prominent among the '400' of Palm Beach society, and were also active members of the sporting set. Sadly, however, their marital difficulties were equally well known; and the charges and counter-charges of meretriciousness, flowing from both sides of the controversy, made their divorce action a veritable *cause celebre* in social circles across the country. Additionally, as the District Court observed:
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> > 'The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
> >
> > The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . .'

> Finally, on the point of notoriety, it appears that petitioner granted several interviews to news media during the divorce action and allowed herself to be quoted in relation thereto."

Having noted those facts, the Florida Supreme Court failed to reach the necessary conclusion—that respondent was a public figure who had to prove "actual malice" under the applicable decisions of this Court. Instead, the Florida Supreme Court, in the teeth of its factual recital, held that petitioner's report was "not constitutionally protected as being matters of *real* public or general concern" (italics added). This holding, with its clear implication that the Florida Supreme Court will decide what the public *really* should read, underscores the failure of that Court to follow this Court's decisions and the consequent need for correction here as in *Tornillo*.

5. Finally, the "actual malice" standard also applies under the *Hill* decision since, any claim for damage to reputation having been withdrawn, respondent is in essentially the same position as plaintiff Hill, which necessitates the same test.

With the withdrawal of any claim for damages to reputation, no claim exists under the Constitution for pain and suffering resulting from the use of language—noteworthy in this regard is the fact that all constitutional cases in this Court dealing with libel have stressed that any limitations upon the use of language imposed were because of the state interest in protecting reputation. *Garrison,* p. 73, *Rosenblatt,* p. 86, *Hill,* p. 391, *Butts,* p. 135, *Monitor Patriot,* pp. 270, 276, *Pape,* p. 284, *Metromedia,* pp. 48-49, *Gertz,* pp. 347-48. But once the state interest in protecting reputation is withdrawn, which it necessarily was when respondent here withdrew her claim for damage to reputation, there is then no state interest left to protect. It accordingly follows,

constitutionally, that petitioner's right to say what it pleases must be governed solely by an "actual malice" test under the First Amendment.

In sum, it appears here, as in *Tornillo,* that the Florida Supreme Court's failure to observe the guarantees of the First Amendment again requires this Court's corrective action.

CONCLUSION

If the constitutional guarantee of a free press is to mean anything as against a State Supreme Court which pays lip service to but ignores the decisions of this Court, this case must be reviewed.

For the reasons stated, the petition should be granted.

January 30, 1975.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Opinion and Order of the Supreme Court of Florida December 20, 1972, Directing the District Court of Appeal Further to Consider the Case

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MARY ALICE FIRESTONE, Petitioner,

v.

TIME, INC., Respondent.

No. 41868.

Supreme Court of Florida.

Dec. 20, 1972.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hallowes, Jacksonville, for petitioner.

William S. Frates and Larry S. Stewart, of Frates, Floyd Pearson, Stewart, Proenza & Richman, Miami, and Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, for respondent.

McNULTY, District Judge.

We review this day a libel action arising out of a publication in the "Milestones" column of Time magazine relating to a divorce between petitioner and her husband. Our jurisdiction is predicated on conflict which will hereinafter appear.

The assailed publication is as follows:

> "Divorced. By Russel A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach school-

> teacher; on grounds of extreme cruelty and *adultery;* after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'" (Italics added)

The truth is, the divorce was *not* granted on the grounds of adultery.[1] Furthermore, there was no express finding in the judgment of divorce that either of the parties was guilty of marital infidelity, although the trial judge did allude to testimony offered in that regard and commented thereon in the language quoted in the article. As to this, however, the article failed to note that the trial judge expressly stated that he was "inclined to discount much of this testimony as unreliable."[2]

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[1]In reviewing the divorce proceeding on certiorari, this court expressly determined that the trial judge "did not find the wife guilty of adultery." Rather, it was pointed out that the divorce was granted for lack of "domestication," in the language of the trial judge, which of course was not one of the statutory grounds at the time of divorce. We affirmed the decree, nonetheless, but on the ground of "extreme cruelty," the record having fully supported such conclusion and thus necessitating an affirmance. Firestone v. Firestone (Fla. 1972), 263 So. 2d 223.

[2]The relevant portion of the final judgment in this regard is set forth as follows:

> "According to certain testimony in behalf of the defendant, extra-marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated. . . ."

In any case, in this libel action the District Court reversed a judgment in favor of plaintiff-petitioner, concluding that because the petitioner's ex-husband was an heir to the immense Firestone rubber fortune, and because their divorce action itself together with sensational pre-divorce marital difficulties had received nationwide publicity, the foregoing publication was constitutionally protected under the First Amendment of the United States Constitution as being "an event of great public interest" within the rationale of the so-called "New York Times doctrine."[3]

I

The paramount question we must answer, therefore, is whether the publication herein, under the circumstances of its making, is thus constitutionally protected. If it is, then the New York Times standard does apply, viz., assuming a defamatory falsehood, petitioner must prove, with convincing clarity, actual malice, i.e., knowledge of the falsity or a reckless disregard of whether it was false or not.[4] If not constitutionally protected, and again assuming a defamatory falsehood, then the publication herein renders respondent amenable under the Florida common law on the subject, to-wit: that a published defamatory falsehood which is libelous *per se,* unless otherwise privi-

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[3]*See,* Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, citing, New York Times v. Sullivan (1964), 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686.

[4]*Id. See, also,* St. Amant v. Thompson (1968), 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262.

leged,[5] is actionable absolutely and no malice need be shown[6]—truth being the only defense.[7]

As noted, the District Court concluded that the publication herein was constitutionally protected and applied the New York Times standard, *supra.* We disagree; and herein lies the predicate for jurisdictional conflict. For it is the conflict of *decisions,* not of *opinions* or *reasons,* which supply jurisdiction for review by certiorari[8]. If, therefore, the District Court erroneously categorized the Firestone divorce action as an event of "great public interest" within the discipline of *New York Times,* and thereby imposed a greater burden on petitioner than would otherwise be the case under settled Florida libel law, then its decision is in conflict with Florida law on the subject which was left unassailed by *New York Times* and its progency *except* to the extent of publication of matters of "great public interest" *as that term is correctly construed.* We are thus faced with circumscribing "matters of great public interest."

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[5]*See, e.g.,* Hauser v. Urchisin (Fla. 1970), 231 So. 2d 6 (*absolute* privilege for statement by public official in connection with his duties); St. Paul Fire & Marine Ins. Co. v. Icard, Merrill, Cullis & Timm, P. A. (Fla. App. 1967), 196 So. 2d 219 (*absolute* privilege for statements made *in* judicial proceedings); Walsh v. Miami Herald Publishing Co. (Fla. 1955), 80 So. 2d 669 (*qualified* privilege for reports *of* judicial proceedings); Murphy v. Daytona Beach Humane Soc. (Fla. App. 1965), 176 So. 2d 922 (*qualified* privilege in commenting on matter of public interest); and Leonard v. Wilson (Fla. 1942), 8 So. 2d 12 (*qualified* privilege for good faith character reports or references).

[6]*See, e.g.,* Teare v. Local Union No. 295 (Fla. 1957), 98 So. 2d 79; Hartley & Parker, Inc. v. Copeland (Fla., 1951), 51 So. 2d 789; and Commander v. Petersen (Fla. 1934), 156 So. 337.

[7]*See,* Fla. Const. D. R. § 4, F. S. .A. *See, also,* Florida Pub. Co. v. Lee (Fla. 1918), 80 So. 245.

[8]*See,* Gibson v. Maloney (Fla. 1970), 231 So. 2d 823. *See, also,* Fla. Const., Art. V, § 4(2).

II

To begin with, the term "matters of public or general concern" is more apt, as will become obvious, than the expression "matters of great public interest," and we prefer it. Conceptually, it is public *concern* which clearly underlies the *ratio decidendi* of the entire line of Supreme Court cases beginning with *New York Times;* and the concept was ultimately resolved in Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 91 S. Ct. 1811, 26 L. Ed. 2d 296.[9]

> ". . . It is clear that there has emerged from our cases decided since New York Times the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, The System of Freedom of Expression 531-532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of *public or general concern,* albeit leaving the delineation of the reach of that term to future cases." (Italics ours)

Now, it is implicit in these decisions, terminating with *Metromedia,* that not *all* news items or feature articles are

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[9](1971), 403 U. S. 29, 44, 91 S. Ct. 1811, 1820, 29 L. Ed. 2d 296.

constitutionally protected.[10] It must be taken as true, on the other hand, that "newsworthiness" is that which is well calculated to generate wide reader interest and thus may be a legitimate area of exploitation by the communications media. But we perceive a clear distinction between mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others, on the one hand and *real public or general concern* on the other.

What, then, are matters of real public or general concern? Most obvious, of course, are matters relating to governmental affairs, which necessarily involve public officers, public servants and employees and even candidates for public office. Both the public and private activities of these people, to the extent that they relate to performance of their duties or their qualifications or fitness for public service are clearly matters of public concern.

But public concern is not limited to matters governmental. As was said, again in Metromedia:[11]

> ". . . the constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. '[T]he Founders . . . felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government.' [Curtis Publishing Co. v. Butts, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)], Id., at 147, 87 S. Ct., at 1987, 18 L. Ed. 2d at 1107 (opinion of Harlan, J.). Comments in

[10]If *all* news were protected, there would, of course, be no need for a "public concern" category. It should be noted, however, that Justice Douglas disagrees and would extend the protection to include all news items. See his concurring opinion in Garrison v. Louisiana (1964), 379 U. S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125. This view was shared by the late Justice Black and is apparent in his concurring opinion in *Metromedia, id.*, at 57, 91 S. Ct. 1811, 29 L. Ed. 2d 296.

[11]Note 9, *supra*, at 42, 91 S. Ct. at 1819.

> other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest. In Time, Inc. v. Hill, supra, we had 'no doubt that the . . . opening of a new play linked to an actual incident, is a matter of public interest,' 385 U. S. [374,] at 388, 87 S. Ct. [534] at 542, 17 L. Ed. 2d 456 at 467, which was entitled to constitutional protection. Butts held that an alleged 'fix' of a college football game was a public issue. Associated Press v. Walker, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), a companion case to Butts, established that the public had a similar interest in the events and personalities involved in federal efforts to enforce a court decree ordering the enrollment of a Negro student in the University of Mississippi. Thus, these cases underscore the vitality, as well as the scope, of the 'profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U. S. at 270-271, 84 S. Ct. at 721, 11 L. Ed. 2d at 701, 95 A. L. R. 2d 1412."

Thus, it appears, it can be broadly said that matters of real public or general concern are those which invoke common and predominant public activity, participation or indulgence, and cogitation, study and debate; and they include such matters as sporting events,[12] the performing and fine arts,[13] morality and religion,[14] the sciences,[15] and matters

[12]*See*, Time, Inc. v. Johnston (4th Cir. 1971), 448 F. 2d 378.

[13]*See*, Time, Inc. v. Hill (1967), 385 U. S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456; and Man v. Warner Bros., Inc. (S. D. N. Y. 1970), 317 F. Supp. 50.

[14]*See*, Gospel Spreading Church v. Johnson Pub. Co. (1971), 14 U. S. App. D. C. 207, 454 F. 2d 1050; and Spern v. Time, Inc. (W. D. Pa. 1971), 324 F. Supp. 1201.

[15]*See*, United Med. Laboratories, Inc. v. C. B. S. (9th Cir. 1968), 404 F. 2d 706.

relating generally to the health, well-being and general comfort of the public *as a whole.*[16] Accordingly, news items or featured articles or commentaries by communications media relating to these matters are and should be constitutionally protected notwithstanding that obscure *or* prominent individuals may be caught up in the current and regretfully defamed. That this is the law is again postulated in *Metromedia*:[17]

> "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication *involving matters of public or general concern,* without regard to whether the persons involved are famous or anonymous." (Italics added)

[16]*See, e. g.,* United Med. Laboratories, Inc. v. C. B. S., note 15, *supra* (health); Cullen v. Grove Press, Inc. (S. D. N. Y. 1967), 276 F. Supp. 727 (hospital for the criminally insane); Time, Inc. v. Ragano (5th Cir. 1970), 427 F. 2d 219 (organized crime); DeSalvo v. 20th Century Fox (D. Mass. 1969), 300 F. Supp. 742 (notorious individual crime); Dacey v. Florida Bar, Inc. (5th Cir. 1970), 427 F. 2d 1292 (probate matters); Cervantes v. Time, Inc. (8th Cir. 1972), 464 F. 2d 986 (corruption of government official); Novel v. Garrison (N. D. Ill. 1971), 338 F. Supp. 977 (assassination of a president); and Bon Air Hotel, Inc. v. Time, Inc. (5th Cir. 1970), 426 F. 2d 858 (decline of famous hotel).

[17]Note 9, *supra,* at 43, 91 S. Ct. at 1819.

A fortiori, if one *by his own volition* thrusts himself on the passing scene to the extent that he knowingly and consciously wants and needs publicity or public support for his endeavors or activities he *surely* submits himself to public scrutiny, which oftentimes may justly expose his private affairs as they might relate to the activities or endeavors for which he is seeking public approval.[18] Justice Terrell aptly noted this maxim in Kennett v. Barber:[19]

> ". . . one . . . who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that they may determine whether it squares with such a standard of integrity and correct morals as warrants their approval. Cason v. Baskin, Fla., 30 So. 2d 635."

III

But while we agree to all this, we are nevertheless strongly persuaded from our reading of the cases that a line must be drawn somewhere. For instance, Mr. Justice Brennan said in *Metromedia*:[20]

> "Further reflection over the years since New York Times was decided persuades us that the view of the 'public official' or 'public figure' as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either

[18]*See,* Ocala Star Banner Co. v. Damron (1971), 401 U. S. 295, 91 S. Ct. 628, 28 L. Ed. 2d 57. *See, also,* Gibson v. Maloney, note 8, *supra.*

[19](Fla. 1947), 159 Fla. 81, 31 So. 2d 44, 46.

[20]Note 9, *supra,* at 47, 91 S. Ct. at 1822.

to the values protected by the First Amendment or to the nature of our society. We have recognized that '[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.' Time, Inc. v. Hill, supra, 385 U. S. at 388, 87 S. Ct. at 542, 17 L. Ed. 2d at 467. Voluntarily or not, we are all 'public' men to some degree."

However, he went on:

"Conversely, some aspects of the lives of even the Most public men fall outside the area of matters of public or general concern. See n. 12, supra; Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are *not* in the area of public or general concern." (Italics added)

And even though the court held in that case that the subject matter of the questioned publication therein was clearly a matter of public or general concern, the court in a footnote went out of its way to recognize the point we make here;[21]

[21] *See,* note 12 in *Metromedia,* note 9 *supra,* at 44, 91 S. Ct. at 1820.

"We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities *not* within the area of public or general interest." (Italics added)

We hold up to the proposition, therefore, that regardless of the prominence of the person defamed there still may be a sector of his private life which is of no real concern to the public; and this private sector should be as zealously protected from defamation as is the right of the public to be concerned, and thus informed, about the public sector of his life.[22]

IV

So recognizing the pre-eminence of real public concern *vis a vis* the private affairs of the prominent or anonymous individual in terms of First Amendment sanctions, how, then, constitutionally to balance the rights of each to the extent it is legally possible to do so? The problem is a bifurcated one, obviously. We either must determine when or at what point the private activities of a public or prominent figure become the real concern of the public; or, alternatively, we must determine when conduct, or an event or series of events, or an historical occurrence or happening, or other noteworthy and recordable occasion, involves a *subject* of true public concern.

[22] *See, also,* Belli v. Orlando Daily Newspapers, Inc. (5th Cir. 1967), 389 F. 2d 579, 587; and Buckley v. Esquire, Inc. (S. D. N. Y. 1972), 344 F. Supp. 1133.

In either case, we think that as a workable test the question is whether there is a *logical relationship* between the reported activities of the prominent person, or between the subject matter of the conduct, occasion or event reported or recorded, and the real concern of the public. This is clearly a matter of *law,* since reasonable men cannot differ on what is logical although logical men may differ on what is reasonable. Thus a publisher need not gamble on whether a given jury may reject as unreasonable his decision that a proposed publication involves a matter of public or general concern. He need only exercise *responsible judgment* in the premises, which is the least that's expected of him to begin with. He would exploit mere sensationalism at his own risk.

We cannot, of course, nor need we, attempt to hypothesize the manifold factual situations on either side of the question. Suffice it here to make note of the judiciousness suggested in *Metromedia:* ". . . the delineation of the reach" of the term "issue of public or general concern" ought be left to "future cases."[23] This is one of those future cases.

V

We now review the pertinent facts in this case in the light of the foregoing observations. As noted, petitioner and her ex-husband were well known. They were prominent among the "400" of Palm Beach society, and were also active members of the sporting set. Sadly, however, their marital difficulties were equally well known; and the charges and counter-charges of meretriciousness, flowing from both sides of the controversy, made their divorce action a vertiable *cause celebre* in social circles across the country. Additionally, as the District Court observed:[24]

[23]*See,* note 9, *supra,* 91 S. Ct. 1811, 29 L. Ed. 2d 296.
[24]Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, 389.

> "The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
>
> The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . ."

Finally, on the point of notoriety, it appears that petitioner granted several interviews to news media during the divorce action and allowed herself to be quoted in relation thereto.

But withal, we are committed to the view that neither wealth, social position nor fame, of themselves, render the private affairs of those involved amenable to constitutionally protected unbridled public scrutiny under the guise of public or general interest. That the public was curious, titillated or intrigued with the scandal in the Firestone divorce is beyond doubt. But we again emphasize the distinction we make between that genre of public interest and real public or general *concern.* Applying the suggested test, where in this case is the logical relationship between the marital difficulties of the Firestones and real public concern? The matter certainly doesn't inhere significantly within the areas of public concern we categorized earlier;[25] and no category otherwise can be articulated except prurient curiosity, which we reject as too frivolous a predicate upon which to expend constitutional energies.

[25]While martial infidelity is still within the scope of "morality," notwithstanding this "enlightened age," that involved in a given marriage is not, significantly, a matter of any great public importance.

We would arrive at a different conclusion, no doubt, if (as in the celebrated case of a renowned conductor of the London Symphony who was sued for divorce some few weeks after publishing a book offering advice on martial bliss) one or the other of the parties herein were a profession marriage counselor. Obviously, in such case as an illustration, there would be a logical connection between the divorce action and the inquiring concern of the public whose patronage is sought. Likewise, as another and concrete, example, if the divorce were peripherally, or even prominently, alluded to in an exposé or feature article essentially exploring some other subject of legitimate public inquiry, such as the exposé of widespread wiretapping and "snooping" published in Life magazine which gave rise to another libel action between the parties hereto in the federal courts,[26] there would again be a valid basis for constitutional protection.[27] But we cannot find here any aspect of real public concern, and none has been shown to us, which would be furthered or enhanced by "free discussion" and "robust debate" about the divorce of Russell and Mary Alice Firestone.

Nor did petitioner's quoted interviews with the press raise the untidy affair to the dignity of true public concern. Unlike an actress who might grant interviews relating to

[26]See, Firestone v. Time, Inc. (5th Cir. 1972), 460 F. 2d 712.

[27]We do not mean to say, however, that a publisher can create his own "matter of public concern" and thereby defame others. We seriously doubt, for example, that Dr. Kinsey without obvious good purpose could have brought into constitutionally protected public focus the identity of those who formed a statistical basis for his "reports." On the other hand, a *bona fide* and responsible inquiry into the validity of the good doctor's reports (which we certainly don't impliedly impugn) could well in an extreme case subject persons involved in such reports to privileged public exposure. In either case, it is assumed, the resolved issue of "actual malice" would determine any question of "bootstrapping," i.e., creating a springboard from which to merely defame or sensationalize.

the opening of her new play, petitioner was not seeking public patronage. Publicity, or sympathy, perhaps, but not patronage. Irrespective of her subjective motives, objectively she was merely satiating the appetites of a curious press.

In sum, the Firestone divorce action was unquestionably newsworthy, but reports thereof were not constitutionally protected as being matters of real public or general concern.

VI

There may be other reasons, however, to reverse the judgment for petitioner herein. For example, although not *constitutionally* protected under the New York Times doctrine, the assailed publication herein may be "conditionally privileged" under Florida libel law. That is to say, being a report of a judicial proceeding (one such privileged publication) it may be so privileged within the contemplation of our previous holdings in Walsh v. Miami Herald Publishing Co.[28] and Shiell v. Metropolis Co.[29] This theory of defense was argued by respondent before the District Court along with five other points including the principal one upon which that court finally bottomed its decision. But the court disposed of all these matters by saying:[30]

> "Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error

[28](Fla. 1955), 80 So. 2d 669.

[29](Fla. 1931), 136 So. 537.

[30]Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, 387.

> we deem it judicious to only plumb one area, constituional privilege, better known as the New York Times doctrine."

Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points raised.

Accordingly, certiorari is granted, the decision of the District Court is quashed, and the cause is remanded for further proceedings not inconsistent herewith.

ERVIN, CARLTON and DEKLE, JJ., concur.

ROBERTS, C. J., concurs specially with opinion.

ROBERTS, Chief Justice (concurring specially).

I concur in the opinion and judgment for the reasons stated and for the further reason that the libel was perpetrated by a weekly rather than a daily publication. In Ross v. Gore, 48 So. 2d 412 (Fla. 1950), and Jacova v. Southern Radio and Television Company, 83 So. 2d 34 (Fla. 1955), this Court commented that daily publications operate against stringent deadlines for the reason that the American public has come to demand "Today's news today". A reporter is expected to determine the facts in a matter of hours or minutes and it is only reasonable to expect that mistakes will be made.

In recognition of this fact, our state legislature has provided in Section 770.02, Florida Statutes, F. S. A., for correction, apology, or retraction by newspaper.

This statutory provision provides as follows:

> "If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

This retraction law excuses the newspaper from most of its liability if a simple correction and retraction of the inadvertent misstatement is made by publication in the same editions or corresponding issues of the newspaper.

However, a weekly publication does not have such stringent deadlines as the daily publications and can take the necessary time to fully explore the truth or falsity of a news item.

Section 4 of our Declaration of Rights (Article I, Constitution of Florida) guarantees that, "Every person may speak, write and publish his sentiments on all subjects *but shall be responsible for the abuse of that right.*" In overdramatizing the news item sub judice, the magazine simply closed its eyes to that portion of our constitution which says, "but shall be responsible for the abuse of that right".

The daily newspapers in Florida have not hesitated to retract and correct inadvertent misstatements in accordance with Section 770.02, Florida Statutes, F. S. A. Time, Inc., magazine was afforded the same opportunity, but refused to take advantage of this statutory provision.

APPENDIX B

APPENDIX B

Opinion and Order of the District Court of Appeal June 20, 1973, Directing Entry of Judgment for Petitioner

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TIME, INC., Appellant,

v.

MARY ALICE FIRESTONE, Appellee.

No. 70-802.

District Court of Appeal of Florida,

Fourth District.

June 20, 1973.

Rehearing Denied July 11, 1973

Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, and William S. Frates and Larry S. Stewart, of Frates, Floyd, Pearson & Stewart, Miami, for appellant.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean & Hallowes, West Palm Beach, for appellee.

WALDEN, Judge.

UPON SUPREME COURT MANDATE

This appeal is back before us per Mandate of the Florida Supreme Court based on its opinion and judgment reported as Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745. Faithful to its requirement, we vacate our opinion

reported as Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, insofar as it found merit in appellant's Point III:

> If there is a cause of action, whether plaintiff's proof was sufficient under the doctrine of New York Times v. Sullivan.

And now to the dilemma and our perplexity. What is our present duty and the requirement of law as concerns the treatment and disposition of appellant's remaining points? These points are:

POINT I

Whether there is a cause of action for libel without damage to reputation.

POINT II

Whether the publication fairly and accurately reported the final judgment.

POINT III

(Determined by the Supreme Court to be without merit in Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745.)

POINT IV

If there is a cause of action, whether plaintiff's proof was sufficient under the doctrine of common law qualified privilege for reports of judicial proceedings.

POINT V

Whether the defendant was denied a fair and impartial trial by plaintiff's counsel's appeals to passion and prejudice.

POINT VI

Whether plaintiff established any recoverable compensatory damages.

We chronicle:

When we undertook the determination of this appeal initially we considered each and every appellate point in depth and decided them in accordance with our understanding of law and the appellate function. We adjudged that Point V was without merit and apparently this decision has been accepted by the Supreme Court and the litigants. We decided that the remaining points had reversible merit, and reversed and remanded with instructions to enter a final judgment in favor of appellant, Time, Inc. It was our notion then and now that the litigants and the trial court (and the Supreme Court, upon the granting of certiorari) would surely know by reference to the points, which are of record, the reasons for our decision and the precise action to be taken by the trial court. This is to be distinguished from an instance where there is a naked reversal without directions or reference to any specific points on appeal, as Scott v. Rosenthal, Fla. App. 1960, 118 So. 2d 555; Fla. 1961, 131 So. 2d 480, and such instance as where there is not a majority opinion leaving the trial court without guidance on remand. Leveson v. State, Fla. App. 1962, 138 So. 2d 361; Fla., 147 So. 2d 524. Neither is this a case where jurisdiction is in issue and basis therefor unclear. Rosenthal v. Scott, supra; State v. Bruno, Fla. 1958, 104 So. 2d 588.

We assume that the litigants understood that we had fully adjudicated all points based upon the Supreme Court remark,[1]

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[1]Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745, ¶ VI, p. 753.

"Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court." And so it appears to us that *all points* and decisions as to them were presented to the Supreme Court for certiorari review.

By way of hindsight, we wish that we had more artfully expressed our decision inasmuch as it, in application, has apparently been misunderstood or overlooked upon further appellate review. We said the following[2]:

> "Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. *We conclude that there is merit,* to various degrees, *to each point on appeal with the exception of number 5, passion and prejudice.* Since we find a multitude of reversible error we deem is judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine." (Emphasis supplied.)

Our decision to write an expanded opinion only upon Point III was based upon our interpretation of Canon 19 of the Canons of Judicial Ethics[3] and our concept of the

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[2]Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, at p. 387.

[3]Canons of Judicial Ethics, 19 Judicial Opinions.

"* * *

"It is desirable that Courts of Appeal in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

"But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be

tenets of judicial professionalism and tradition. We selected it simply because we thought it central and felt its determination would be of the largest service to the litigants, Bench and Bar. We deliberately did not discuss each of the points in detail because of the volume that would result and the basic fact that time and resource limitations preclude written opinions on each and every point presented in every brief. No court rule, statute, or court opinion requires such treatment to our knowledge. Of course, had we known at the time that our Point III opinion would not survive, we would have chosen another point to discuss in depth as a basis for reversal.

We deliberately did decide the merit of each point presented in an effort to be of assistance to the Supreme Court in case certiorari would be granted. We did this, too, in order to save the yo-yo or ping-pong effect of passing the appeal back and forth between the two courts with decisions being made a point at a time. Theoretically, there being six points, there could be twelve appellate presentations and twelve written opinions if this appeal were decided piecemeal, a point at a time, with the District Court being quashed in each instance. See Zirin v. Charles Pfizer & Co., Fla. 1961, 128 So. 2d 594, at 596, where it is said:

> "Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without 'sale, denial or delay.' *Piecemeal determination of a cause by our appellate court should be avoided and when a*

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published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

"* * *."

case is properly lodged here there is no reason why it should not then be terminated here. In the Lissenden case [P. C. Lissenden Co., Inc. v. Board of County Commissioners of Palm Beach County, Fla., 116 So. 2d 632] we said, with respect to appeals and in discussing an analogous matter '[m]oreover, the efficient and speedy administration of justice is * * * promoted' by doing so." (Emphasis supplied.)

The Supreme Court in the instant case said with reference to this problem[4]:

"There may be other reasons, however, to reverse the judgment for petitioner herein. For example, although not *constitutionally* protected under the New York Times doctrine, the assailed publication herein may be 'conditionally privileged' under Florida libel law. That is to say, being a report of a judicial proceeding (one such privileged publication) it may be so privileged within the contemplation of our previous holdings in Walsh v. Miami Herald Publishing Co. [(Fla. 1955), 80 So. 2d 669] and Shiell v. Metropolis Co. [(1931), 102 Fla. 794, 136 So. 537]. *This theory of defense was argued by respondent before the District Court along with five other points including the principal one upon which that court finally bottomed its decision.* But the court disposed of all these matters by saying: [Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, 387]

'Time has presented six cogent points on appeal. We have examined all briefs, transcripts

[4]Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745, at p. 752.

and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error we deem it judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine.'

"Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, *we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points raised.* (Emphasis supplied.)

"Accordingly, certiorari is granted, the decision of the District Court is quashed, and the cause is remanded for further proceedings not inconsistent herewith."

We gather that the gravamen of the above passage is that we are being directed "* * * initially to pass on the full merit of the remaining points raised." We, in all respect, interpret this to mean that our earlier decision on the points is being overlooked and we are directed to write an opinion on each of the four remaining points.

It is our respectful view, based on the foregoing, that there is a misunderstanding or lack of communication between our two courts.

We feel that the Supreme Court has been in nowise embarrassed or limited by our action and procedure. The Supreme Court, itself, has said that "* * * once we take jurisdiction of a case upon petition for a writ of certiorari we may take it for all purposes as though it had come originally on appeal to the Supreme Court." Mark v. Hahn, Fla. 1965, 177 So. 2d 5, at page 9, citing Tyus v. Apalachicola Northern R. R. Co. (Fla. 1961), 130 So. 2d 580; Zirin v. Charles Pfizer & Co. (Fla. 1961), 128 So. 2d 594; Adjmi v. State (Fla. 1963), 154 So. 2d 812; Hedges v. State (Fla.), 172 So. 2d 824; Florida Real Estate Commission v. Harris (Fla.), 134 So. 2d 785. See also Schoenrock v. Ballard, Fla. App. 1966, 185 So. 2d 760. Thus, it is clear that the Supreme Court had the power without hindrance to consider, review and decide all appellate points when it took jurisdiction and such action would avoid the needless additional steps condemned in Zirin v. Charles Pfizer & Co., supra.

We also note that the litigants are not entitled to a written opinion on each or any point as a matter of constitutional right. Taylor v. Knight, Fla. App. 1970, 234 So. 2d 156.

Without laboring the matter further, if it was the intendment of the Supreme Court to cause this court to reconsider its earlier decision and to write an opinion on each of the points supporting our decision, we must most respectfully decline upon the rationale and reasoning contained in Foley v. Weaver Drugs, Inc., Fla. App. 1965, 172 So. 2d 907; Young Spring & Wire Corp. v. Smith, Fla. App. 1965, 172 So. 2d 238; Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., Fla. App. 1965, 172 So. 2d 248; Home Development Co. of St. Petersburg v. Bursani, Fla. App. 1965, 176 So. 2d 100; and Hoisington v. Kulchin, Fla. App.

1965, 178 So. 2d 349. We specially agree with the rationale stated in Hoisington v. Kulchin, supra:

> "For the reasons set forth in the second opinion of this court in Foley v. Weaver Drugs, Inc., Fla. App. 1965, 172 So. 2d 907, we must respectfully decline, at this late date, to reconsider the cause and set forth the basis and reasoning for our decision. This is not to say that we do not recognize the paramount responsibility of the Supreme Court of Florida to supervise the judicial system of Florida. Our disinclination to comply with the request is based upon our concern for the proper function of this court in the judicial system of Florida; for to comply with the request would be to make an advocate of this Court if it should attempt to set forth the basis of its reasoning after its jurisdiction has expired.
>
> "Courts, be they trial or appellate, should at all times adhere to an atmosphere of cold neutrality and, at this stage of these proceedings, to write an opinion supporting a decision in favor of the appellees would in effect destroy the cold neutrality of impartiality and would relegate the court to an advocate who, by nature, must be partial."

Thus, in conclusion, we vacate our opinion reported at 254 So. 2d 386, in favor of the Supreme Court opinion reported at 271 So. 2d 745, insofar as it disposes of appellant's Point III.

Not newly, but by way of confirmation of our initial decision, reported at 254 So. 2d 386, we adjudicate that appellant's Points I, II, IV and VI have merit sufficient to

cause the reversal of the appealed judgment and entry of judgment for the defendant, Time, Inc.

In other words, we held as the basis and reason for our prior decision by reference and in the language of the points:

I. There is no cause of action for libel without damage to reputation.

II. The publication fairly and accurately reported the final judgment.

IV. Plaintiff's proofs were insufficient under the doctrine of common law privilege for reports of judicial proceedings.

V. Defendant was not denied a fair and impartial trial by plaintiff's counsel's appeal to passion and prejudice.

VI. Plaintiff did not establish any recoverable compensatory damages.

We do, therefore, adhere to our decision expressed in 254 So. 2d 386, to reverse the trial court and direct entry of judgment in favor of the defendant, Time, Inc., because of the reversible errors covered by Points I, II, IV, and VI.

It is so ordered.[5]

REED, C. J., and OWEN, J., concur.

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[5]We recognize, of course, that if the ligitants continue to be aggrieved and in case we have erred or misconstrued, the Supreme Court of Florida continues to have jurisdiction to correct and implement its mandate and, in the ultimate, to cause the disposition of this appeal in accordance with its views of the law. See generally 2 Fla. Jur., Appeals, §§ 387, 391.

APPENDIX C

APPENDIX C

Opinion and Order of the Supreme Court of Florida December 11, 1974, Directing Entry of Judgment for Respondent

IN THE

SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1974

MARY ALICE FIRESTONE,
Petitioner,
v.
TIME INC.,
Respondent.

Case No. 44,207
DCA Case No. 70-802

Opinion filed December 11, 1974

Writ of Certiorari to the District Court of Appeal, Fourth District

Robert M. Montgomery, Jr. and Edna L. Caruso of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hall-lowes, for Petitioner

William S. Frates and Larry S. Stewart of Frates, Floyd, Pearson, Stewart, Proenza and Richman; and Harold R. Medina, Jr. of Cravath, Swaine and Moore, for Respondent

PER CURIAM.

This cause is before us on certiorari granted to review the decision of the District Court of Appeal, Fourth District, in *Time, Inc.* v. *Firestone,* opinion filed June 20, 1973, reported at 279 So. 2d 389 (Fla. App. 1973), which purportedly conflicts with *Coogler* v. *Rhodes,* 38 Fla. 240, 21 So. 109 (1897), *Montgomery* v. *Knox,* 3 So. 211 (Fla. 1887), *Myers* v. *Hodges,* 53 Fla. 197, 44 So. 357 (Fla.

1907), *Tip Top Grocery Co.* v. *Willner,* 186 So. 219 (Fla. 1938), *Miami Herald Pub. Co.* v. *Brown,* 66 So. 2d 679 (Fla. 1953), *McCormick* v. *Miami Herald Publish. Co.,* 139 So. 2d 197 (Fla. 1962), and *Hammond* v. *Times Publishing Co.,* 162 So. 2d 681 (Fla. App. 1964). We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, 1973.

Petitioner, herein, seeks review of the latest in a series of District Court opinions relative to her libel suit against respondent for publication of the following news item about petitioner:

> "Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune. Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on the grounds of extreme cruelty and *adultery;* after six years of marriage; one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl'." (emphasis supplied)

The decree of divorce was granted not on grounds of adultery but rather was granted on grounds of extreme cruelty. In the final judgment granting the divorce, the trial court found the equities to be with Mrs. Firestone and awarded her substantial alimony. Additionally, the trial court although stating that enough testimony had been introduced to make Dr. Freud's hair curl, specifically stated in the final judgment that the court was inclined to discount much of the testimony as unreliable.

After publication of the aforestated news item, petitioner demanded in writing a retraction of the article and alleged

that it was false, malicious and defamatory. The respondent declined to retract.

Complaint was thereafter filed by petitioner alleging that respondent had maliciously prepared, composed, published and distributed the above-described defamatory article. Summary judgment was entered by the trial court in favor of respondent. However, upon appeal of this summary judgment to the District Court of Appeal, Fourth District, that court, finding that there were genuine issues of material fact to be resolved by the trier of fact, including, inter alia, the question of malice, reversed and remanded the cause to the trial court. *Firestone* v. *Time, Inc.,* 231 So. 2d 862 (Fla. App. 1970), cert. denied 237 So. 2d 754. Upon remand, after trial by jury, verdict having been entered in favor of petitioner and against respondent, in the sum of $100,000, the trial court entered final judgment ordering that petitioner recover said sum from respondent.

Upon appeal, the District Court of Appeal, Fourth District, reversed the judgment primarily on the ground that the divorce was an event of great public interest within the rationale of *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), and that there was no malice on the part of Time, Inc. shown as required for recovery under the doctrine of *New York Times* v. *Sullivan,* supra.

This Court granted certiorari and reversed the above decision of the District Court on the basis that the publication did not come within the New York Times doctrine, specifically stating:

> "In sum, the Firestone divorce action was unquestionably newsworthy, but reports thereof were not constitutionally protected as being matters of real public or general concern." *Firestone* v. *Time, Inc.,* 271 So. 2d 745 (Fla. 1972).

However, this Court did not decide the remaining points raised by respondent, but rather remanded to the District Court, stating:

> "Respondent argues essentially the same points here, with the exception of the passion and prejudice point, rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points."

Upon remand to reconsider the remaining points raised on appeal, in a decision entitled "Upon Supreme Court Mandate," *Time, Inc.* v. *Firestone,* 279 So. 2d 389 (Fla. App. 1973), the District Court stated that it assumed that all litigants understood that all points raised on appeal had been adjudicated in its prior decision. Noting that the litigants are not entitled to a written opinion on each and every point, the District Court, by way of confirmation of its initial decision reported at 254 So. 2d 386, adjudicated without explanation that Time, Inc.'s Points I, II, IV and VI, as specifically delineated in its decision, have merit sufficient to cause reversal of the appealed judgment and entry of judgment for Time, Inc.

We cannot agree with the decision of the District Court which reverses the judgment of the trial court. As previously stated herein, the truth is that the divorce was *not* granted on grounds of adultery and there was no express finding in the final judgment of divorce that either of the parties was guilty of marital infidelity. This Court in *Firestone* v. *Time, Inc.,* 271 So. 2d 745 (Fla. 1972), in a pertinent footnote expressly stated:

> "In reviewing the divorce proceeding on certiorari, this court expressly determined that the trial judge 'did not find the wife guilty of adultery.' Rather, it was pointed out that the divorce was granted for lack of 'domestication,' in the language of the trial judge, which of course was not one of the statutory grounds at the time of divorce. We affirmed the decree, nonetheless, but on the ground of 'extreme cruelty,' the record having fully supported such conclusion and thus necessitating an affirmance. Firestone v. Firestone (Fla. 1972), 263 So. 2d 223."

The appropriate statutory procedure was followed by petitioner in requesting retraction of the defamatory publication which is the subject of this suit, Sections 770.01 and 770.02, Florida Statutes, *Ross* v. *Gore,* 48 So. 2d 412 (Fla. 1950), but respondent elected not to retract and must stand upon the accuracy of its statements. *Walsh* v. *Miami Herald Publishing Co.,* 80 So. 2d 669 (Fla. 1955). The statement that the divorce was granted on grounds of adultery is totally inaccurate.

The false accusation of a woman of adultery is libelous per se. *Layne* v. *Tribune Co.,* 146 So. 234 (Fla. 1933), *Harriss* v. *Metropolis Co.,* 160 So. 205 (Fla. 1935), *Sharp* v. *Bussey,* 187 So. 779 (Fla. 1939), 20 Fla. Jur. Libel and Slander, Section 20, 50 Am. Jur. 2d Libel and Slander, Section 60, Restatement of the Law of Torts, Chapter 24, Section 569 f.[1] Words which amount to libel per se import

[1]Not only does the statement that a woman has committed adultery impute unchastity but furthermore it imputes to another conduct constituting a criminal offense. Section 798.01, Florida Statutes,

damages and malice and are actionable in and of themselves without allegation or proof of special damages. *Briggs* v. *Brown,* 55 Fla. 417, 46 So. 325 (Fla. 1908), *Johnson* v. *Finance Acceptance Co. of Georgia,* 159 So. 364 (Fla. 1935), *Cooper* v. *Miami Herald Pub. Co.,* 31 So. 2d 382 (Fla. 1957), *Campbell* v. *Jacksonville Kennel Club,* 66 So. 2d 495 (Fla. 1953). Relative to the presumption of recoverable compensatory damages, this Court stated in *Commander* v. *Pedersen,* 156 So. 337 (Fla. 1934):

> "The law applicable to the case under consideration appears to be stated in 17 R. C. L. 263 et seq., as follows:
>
> ". . .
>
> ". . . In the case of words actionable per se their injurious character is a fact of common notoriety, established by the general consent of men, and the court consequently takes judical [sic] notice of it. They necessarily import damage, and therefore in such cases general damages need not be pleaded or proved . . ., and special damage need not be shown to sustain the action. Moreover, malice is presumed as a matter of law in such cases. . . ."

The Supreme Court of the United States in *Gertz* v. *Welch, Inc.,* opinion decided June 25, 1974, has recently stated that,

> "It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther

provides: "Living in open adultery.—Whoever lives in an open state of adultery shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. Where either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense provided for in this section."

> than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

Sub judice, the trial judge properly instructed the jury that if libel is proven by the greater weight of the evidence *which caused actual damages* to the plaintiff, they should award plaintiff an amount of money that will fairly and adequately compensate her for such damages, and instructed that "It is *only damages which are a direct and natural result of the alleged libel* which may be recovered. If you find the plaintiff is entitled to recover damages, you may consider any shame, mortification, mental anguish, or hurt feelings experienced in the past or to be experienced in the future, if any, which you find from the evidence. There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in light of the evidence." (emphasis supplied). The jury heard the testimony and considered the evidence before

it, and the factors enumerated in the instruction of the trial judge which are the same as those set out by the Supreme Court of the United States in *Gertz,* supra, and upon the evidence decided that a just and fair award for the damages suffered by petitioner would be $100,000. This award is supported by competent evidence concerning the injury. As aforestated, the Supreme Court of the United States in *Gertz,* supra, recognized that there need be no evidence which assigns an actual dollar value to the injury.

We must also emphasize that the trial court specifically instructed the jury that,

> "I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of *Firestone* v. *Firestone,* Case No. 64 C 2790C. *McCormick* v. *Miami Herald Publishing Co.,* 139 So. 2d 197 (2nd DCA 1962)."

Therefore, to reach a verdict for petitioner, the jury must necessarily have determined that the article did have a different effect than the reading of the divorce judgment by the public. In *McCormick* v. *Miami Herald Publishing Company,* 139 So. 2d 197 (Fla. App. 2, 1962), the court stated that a workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. See also, *Hammond* v. *The Times Publishing Co.,* 162 2d 681 (Fla. App. 2, 1964). Evidently, the jury determined sub judice that the article in question would have a different effect.

In *Firestone* v. *Time, Inc.,* 271 So. 2d 745 (Fla. 1972), relative to the statement herein involved, this Court explained:

> "If not constitutionally protected, and again assuming a defamatory falsehood, then the publication herein renders respondent amenable under the Florida common law on the subject, to-wit: that a published defamatory falsehood which is libelous *per se,* unless otherwise privileged, is actionable absolutely and no malice need be shown—truth being the only defense."

Publications of judicial proceedings under the laws of Florida are only qualifiedly privileged *if* they are fair and impartial *and also* accurate in regard to all material matters. *Shiell* v. *Metropolis Co.,* 136 So. 537 (Fla. 1931), *Walsh* v. *Miami Herald Publishing Co.,* supra. If a statement is qualifiedly privileged and is made without malice, then no cause of action accrues. *Teare* v. *Local Union No. 295 of United Assn. of Journeymen and Apprentices of Plumbers & Pipefitters, etc.,* 98 So. 2d 79 (Fla. 1957).

Sub judice, the trial judge properly submitted the question of fairness and accuracy of the publication on material matters and the question of malice or reckless disregard on the part of respondent in publishing said article to the jury. Quoting with approval from *Age-Herald Publishing Co.* v. *Waterman,* 102 Ala. 665, 81 So. 621, this Court declared in *Shiell* v. *Metropolis Co.,* supra, as follows:

> "A fair and accurate report may be made of a judicial proceeding either by reporting it literally and completely, or by giving a more or less condensed summary. And in case of a partial or con-

> densed report its fairness and accuracy with respect to the particular question in hand must in general be determined by the jury. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 449, 61 So. 345. In the instant case it was clearly a jury question."

See also: *Metropolis Co.* v. *Croasdell,* 199 So. 568 (Fla. 1941), *Meyers* v. *Hodges,* 53 Fla. 197, 44 So. 357 (Fla. 1907), *Coogler* v. *Rhodes,* 38 Fla. 240, 21 So. 109 (1897), *Diplomat Elec. Inc.* v. *Westinghouse Elec. Supply Co.,* 430 F. 2d 38 (5th Cir. 1970), *Morgan* v. *Dun & Bradstreet, Inc.,* 421 F. 2d 1241 (5th Cir. 1970).

Careful examination and consideration of the record discloses that the judgment of the trial court is correct and should have been affirmed on appeal to the District Court.

Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz* v. *Welch, Inc.,* supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of "journalistic negligence."

Accordingly, the decision of the District Court is quashed and the cause is remanded with directions to reinstate the jury verdict and final jugdment thereon in favor of petitioner.

It is so ordered.

ADKINS, C.J., ROBERTS, BOYD and DEKLE, JJ., Concur

OVERTON, J. Dissents with opinion

ERVIN J., Dissents

OVERTON, J., dissenting.

I dissent. In my opinion, there is no conflict jurisdiction. The District Court, in reversing the trial court, properly applied McCormick v. Miami Herald Publishing Company, 139 So. 2d 197 (Fla. 1962), and Hammond v. Times Publishing Company, 162 So. 2d 681 (Fla. App. 1964).

APPENDIX D

APPENDIX D

Opinion and order of the Circuit Court November 15, 1968, granting summary judgment for petitioner

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR PALM BEACH COUNTY

MARY ALICE FIRESTONE, *Plaintiff*, *vs.* TIME, INC., etc., *Defendant.*	Case No. 68 C 977–Smith

FINAL SUMMARY JUDGMENT

This cause was presented on Defendant's Motion for Summary Judgment. The Court has heard arguments of counsel, has considered the pleadings and the affidavits, timely filed, and the authorities cited, as well as other authorities. The Court cannot consider the affidavit of Joseph D. Farish, Jr., Esquire since the same was not filed until October 18, 1968, ten days following the hearing on Defendant's motion (see Siciliano v. Hunerberg, 135 So. 2d 750 and Stiles, Inc. v. Evans, 206 So. 2d 65).

Plaintiff relies on the case of Belli v. Orlando Daily Newspapers, 389 Fed. 2d 579. This Court also relied on this case in holding that the Complaint states a cause of action, its allegations being taken as true for purposes of ruling on the motion to dismiss. We are now, however, considering whether there is an issue of material fact. The evidence which may be considered by way of affidavits and answers to interrogatories is uncontradicted. In the opinion of this Court it shows that Defendant did not "maliciously" prepare the article in question, that Defend-

ant did not know that any words contained therein were untrue, and that Defendant did not act with malice towards the Plaintiff. Defendant's thorough investigation of the facts, prior to publication of the article conclusively shows a lack of malice or recklessness. Under the facts shown and the authorities studied by the Court, Defendant's motion must be granted. It is thereupon,

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is granted. It is further,

CONSIDERED, ORDERED AND ADJUDGED that the Plaintiff, MARY ALICE FIRESTONE, recover nothing by her suit against the Defendant, TIME, INC., and that said Defendant go hence without day.

DONE AND ORDERED this 15th day of November 1968.

/s/ CULVER SMITH
Circuit Judge

Copy furnished counsel

APPENDIX E

APPENDIX E

Opinion and order of the District Court of Appeal January 26, 1970, reversing the grant of summary judgment

MARY ALICE FIRESTONE, Appellant,

v.

TIME, INC., a foreign corporation transacting business in the State of Florida, Appellee.
No. 2640.

District Court of Appeal of Florida.
Fourth District.
Jan. 26, 1970.
Rehearing Denied March 5, 1970.

Joseph D. Farish, Jr., and Martin J. A. Yeager of Farish & Farish, West Palm Beach, for appellant.

H. R. Medina, New York City, and William S. Frates and Guy B. Bailey, Jr., of Frates, Fay, Floyd & Pearson, Miami, for appellee.

CROSS, Chief Judge.

Appellant-plaintiff, Mary Alice Firestone, appeals from a summary final judgment entered in favor of the defendant-appellee, Time, Inc., a foreign corporation transacting business in the State of Florida, in a cause of action in defamation. We reverse.

On December 15, 1967, Mary Alice Firestone was granted a divorce from Russell A. Firestone, Jr. The defendant, Time, Inc., the publisher of the magazine "Time," printed on December 22, 1967, under the heading "Milestones" the following article:

> "Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune; Mary Alice Sullivan Firestone, 32,

> his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl'."

Thereafter on January 19, 1968, the plaintiff, Mary Alice Firestone, by her attorney demanded in writing a retraction of the said article. The defendant declined to retract.

Plaintiff then filed her complaint alleging that the defendant had maliciously prepared, composed, published and distributed the above alluded to article, which she claimed to be defamatory. The defendant in answer to plaintiff's complaint, denied the material allegations and asserted among other things the absence of actual malice.

Written interrogatories were propounded to the defendant, and prior to answer thereto the defendant moved for summary judgment. At the hearing on the motion for summary judgment the plaintiff orally moved for a continuance based on the fact that the defendant had not yet answered the interrogatories and that the interrogatories requested answers that would contain evidence material and relevant to the issues. The trial court denied the continuance.

After the defendant answered the interrogatories and prior to the court's ruling on the motion for summary judgment, the plaintiff submitted an affidavit of one Joseph D. Farish, Jr., which she asserted was in part based upon defendant's answers to interrogatories. The trial court declined to consider the affidavit on the basis of its being

untimely filed. Summary judgment was entered for the defendant, which in part reads as follows:

> "This cause was presented on Defendant's Motion for Summary Judgment. The Court has heard arguments of counsel, has considered the pleadings and the affidavits, timely filed, and the authorities cited, as well as other authorities. The Court cannot consider the affidavit of Joseph D. Farish, Jr., Esquire since the same was not filed until October 18, 1968, ten days following the hearing on Defendant's motion (see Siciliano v. Hunerberg [Fla. App.], 135 So. 2d 750 and Stiles, Inc. v. Evans [Stiles, Inc. v. George Evans Co., Fla. App.], 206 So. 2d 65).
>
> "Plaintiff relies on the case of Belli v. Orlando Daily Newspapers, [5 Cir.] 389 Fed. 2d 579. This Court also relied on this case in holding that the Complaint states a cause of action, its allegations being taken as true for purpose of ruling on the motion to dismiss. We are now, however, considering whether there is an issue of material fact. The evidence which may be considered by way of affidavits and answers to interrogatories is uncontradicted. In the opinion of this Court it shows that Defendant did not 'maliciously' prepare the article in question, that Defendant did not know that any words contained therein were untrue, and that Defendant did not act with malice towards the plaintiff. Defendant's thorough investigation of the facts, prior to publication of the article conclusively shows a lack of malice or recklessness. Under the facts

shown and the authorities studied by the Court, Defendant's motion must be granted. It is thereupon,

"ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is granted."

Thereafter plaintiff moved for rehearing. The trial court denied this motion. This appeal followed.

The purpose of RCP Rule 1.510, 31 F. S. A., is to permit expeditious disposition of cases where no substantial issue of fact is presented for determination. It is intended to permit the trial court to pierce formal allegations of fact in pleadings and grant relief by summary judgment when it appears that the uncontroverted facts set forth in the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Leaks v. Adeimy, Fla. App. 1967, 195 So. 2d 47; Lab v. Hall, Fla. App. 1967, 200 So. 2d 556; Stevens v. Gray, Fla. App. 1969, 217 So. 2d 350. But it is not intended that litigants shall be deprived of their right to a full hearing on the merits if any real issue of fact is tendered and "the power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification." Avrick v. Rockmont Envelope Co., 10 Cir. 1946, 155 F. 2d 568, 571. Thus the standards of decisions governing the granting or denying of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of establishing the absence of a genuine issue of material fact. At the same time the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one. It is the movant's burden to exclude the existence of any genuine issue of material

fact. 6 Moore, Federal Practice ¶ 56.15(3). All reasonable inferences are drawn against the movant in favor of the opponent of the motion. Lab v. Hall, supra. The papers supporting the motion are closely scrutinized, and the opposing papers indulgently treated. Holl v. Talcott, Fla. 1966, 191 So. 2d 40.

It is not to be concluded that palpably no genuine issue as to any material fact exists solely because the evidence opposing the claimed fact strikes the judge as being incredible. Issues of credibility are ordinarily for the trier of fact, and the trial court judge does not function as a trier of fact in determining a motion for summary judgment.

Where, as in the case at bar, the opposing party charges the moving party with printing a defamatory publication with malice, and must probe the conscience of the moving party to prove her case, or in any case where the subjective elements of willfulness, intent, maliciousness or good faith of the moving party are material to the claim or defense of the opposing party, a conclusion from papers alone that palpably there exists no genuine issue of material fact will ordinarily be very difficult to sustain. The telltale factor of demeanor in the presence of the trier of fact often assumes such vital importance in cases as the one at bar that the opposing party should generally not be denied the opportunity to have the moving party or its officers, employees or agents appear on the witness stand before the trier of fact. Indeed, subjective elements aside, a note of caution has been sounded in summary judgment proceedings in those cases where the opposing party must prove his claim or defense from what he can draw from the other party. Bozant v. Bank of New York, 2 Cir. 1946, 156 F. 2d 787.

The summary judgment procedure is not a trial by affidavits. Durkin v. Morgan, Fla. App. 1969, 227 So. 2d

231. Ample opportunity should be granted to the opposing party to justify his opposition. RCP Rule 1.510(f) provides that:

> "If it appears from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Plainly, this section of Rule 1.510 contemplates that a denial of the motion for summary judgment is not always to be the result, but the ruling may be deferred and the motion decided after the opposing party has been granted an opportunity to develop through affidavits or depositions material necessary to justify his opposition.

Accordingly, the summary final judgment is reversed, and the cause is remanded to the trial court for further proceedings consistent herewith.

Reversed and remanded.

McCAIN, J., concurs,

REED, J., specially concurs, with opinion.

REED, Judge (concurring specially):

The plaintiff's motion for summary judgment was accompanied by affidavits of its employees each of whom played a part in the construction of the allegedly defamatory article. These affidavits denied actual malice on the part of the defendant and its employees toward the plaintiff

and also denied that defendant's employees had knowledge of the falsity of the article. The affidavits set forth in some detail the source of the information which appeared in the article as well as the efforts involved in checking the accuracy of that information. Basically the source of the information is traceable through the affidavits back to one Robert W. Delaney, a writer associated with Time Magazine. According to the Delaney affidavit, he was told by the attorney for the plaintiff that the grounds for the divorce were adultery and extreme cruelty. The Delaney affidavit also states that Delaney spoke directly with the trial judge, although the affidavit does not relate the conversation between the two of them. The Delaney affidavit is silent as to whether or not Delaney asked the trial judge about the grounds for divorce. None of the affidavits indicate that any of the Time employees actually read the final judgment of divorce before the article was written; however, the affidavit of one George G. Daniels, a Senior Editor of the defendant, reveals that several employees of Time actually checked the court files in connection with the plaintiff's divorce.

The basis for the summary judgment as I understand it was a determination by the trial judge that defendant published the article without actual malice. See the quotation from the final judgment in the majority opinion. We are not required at this stage to decide whether or not a showing of actual malice—as distinguished from implied malice—is essential to the plaintiff's cause of action or whether or not the publication was in any respect privileged. Without regard to those issues, it is my opinion that the trial judge erred in concluding that the affidavits made a showing sufficient for purposes of a summary judgment motion that the article was published without actual malice.

Appendix E

It is correct, as the trial judge pointed out, that the affidavits were uncontradicted, but all of the affidavits were submitted by employees of the defendant who had had a role in the preparation of the article. In my opinion, under these circumstances, there is inherent in the affidavits an issue of credibility which required the denial of the motion for summary judgment. For this reason only, I favor a reversal. See Tucker v. American Employers Insurance Company, Fla. App. 1969, 218 So. 2d 221 (cert. den. Fla. 1969, 227 So. 2d 482), where we said:

> "We are of the view that the granting of a summary judgment for the defendants in this case required the weighing of conflicting inferences *and an assessment of the credibility of interested witnesses* in order to conclude that no genuine issue of material fact existed, and this process is not available in passing on a motion for summary judgment * * *." (Emphasis added.)

APPENDIX F

APPENDIX F

Circuit Court Judgment After Trial September 9, 1970, for Respondent

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,

IN AND FOR PALM BEACH COUNTY, FLORIDA.
CIVIL ACTION

MARY ALICE FIRESTONE,
Plaintiff,
vs.
TIME INC., etc.,
Defendant.

No. 68 C 977-Smith

FINAL JUDGMENT

After trial by jury, a verdict having been entered for the Plaintiff, Mary Alice Firestone, and against the Defendant, Time, Inc., in the sum of $100,000.00, it is, therefore

ORDERED AND ADJUDGED that Plaintiff have and recover from the Defendant Time, Inc. the sum of $100,000.00, for which let execution issue. Costs to be assessed upon proper motion subsequent to this judgment.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida, this 9th day of September, A. D. 1970.

/s/ CULVER SMITH
Circuit Judge

APPENDIX C

APPENDIX G

Opinion and Order of the District Court of Appeal October 28, 1971, Directing Entry of Judgment for Petitioner

TIME, INC., Appellant,

v.

MARY ALICE FIRESTONE, Appellee.

No. 70-802.

District Court of Appeal of Florida,

Fourth District.

Oct. 28, 1971.

Rehearing Denied Dec. 2, 1971.

Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, and William S. Frates and Larry S. Stewart, of Frates, Floyd, Pearson & Stewart, Miami, for appellant.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean & Hallowes, West Palm Beach, for appellee.

WALDEN, *Judge*.

Plaintiff, Mary Alice Firestone, is the ex-wife of the heir to the Firestone rubber fortune. The instant libel action stems from a short article published in Time magazine concerning plaintiff's divorce. The article said plaintiff had been divorced by her husband on grounds of extreme cruelty and adultery.

Plaintiff sued for libel, objecting to the word adultery, because she had received alimony and under Florida Law, F. S. 1967, Section 61.09, F. S. A., an adulterous spouse

may not receive alimony. Plaintiff was awarded $100,000. From that award Time appeals.

Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error we deem it judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine.

The doctrine of constitutional privilege in libel began with a holding that public officials could not be libeled in their public duties without proof of actual malice, *even if the publication was false*. This doctrine was soon expanded to include public figures. The final plateau was reached when the same criteria were held applicable to matters and events of public interest. This last category fits the situation at hand.

1. In capsule, New York Times Company v. Sullivan, 1964, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, established severe constitutional limits on libel actions brought by *public officials*. If the defamatory statement was directed at a public official, and concerned the performance of his public duties, the official could recover for libel only by proving actual malice. Actual malice was defined as knowledge of the falsity of your publication or reckless disregard for its truth.

It soon became apparent, however, that since the qualified privilege of New York Times was a constitutional one founded on the first amendment freedoms of speech and

press (an amendment said to occupy a top place in the hierarchy of the Bill of Rights) it was impossible to limit its application to public officials.

2. In the cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker, 1967, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094, the Supreme Court extended New York Times to include *public figures*, in these cases a football coach and a general with political prominence. Public figures were defined by Pauling v. National Review, Inc., 1966, 49 Misc. 2d 975, 269 N. Y. S. 2d 11, as "a private person who publicly, prominently, actively, and as a leader, thrusts himself (however properly) into a public discussion of public and exceedingly controversial questions." Standards for determining public figures were not exact. Each case was decided on its peculiar facts, each figure deemed public by his peculiar actions. See Cepeda v. Cowles Magazines and Broadcasting, Inc., 1968, 9 Cir., 392 F. 2d 417; Rose v. Koch, 1967, 278 Minn. 235, 154 N. W. 2d 409; Gilberg v. Goffi, 1964, 21 A. D. 2d 517, 251 N. Y. S. 2d 823; Mason v. Sullivan, 1966, 26 A. D. 2d 115, 271 N. Y. S. 2d 314; Dempsey v. Time, Incorporated, 1964, 43 Misc. 2d 754, 252 N. Y. S. 2d 186.

3. The next extension of New York Times began with Time, Inc. v. Hill, 1967, 385 U. S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456. In that case the court applied the Times rule to false reporting of *matters of public interest* in connection with an action for invasion of the right to privacy. In other words, the right to privacy could be invaded if the public interest was great enough. Hill started a flood of public interest cases, Time, Inc. v. McLaney, 1969, 5 Cir., 406 F. 2d 565; Bon Air Hotel, Inc. v. Time, Inc., 1970, 5

Cir., 426 F. 2d 858. The result limited libel verdicts severely.

In sum, in order for a public official, public figure or a person involved in an event of great public interest to succeed in a libel action, actual malice must be proven.

Examples of events in the public interest, events where the public's right to know is superior to the individual's right to collect for damaged reputation include police raids for obscene books, organized crime, garbage pickups, pharmaceutical and laboratory testing, and the Master's Golf Tournament. Rosenbloom v. Metromedia, Inc., 1969, 3 Cir., 415 F. 2d 892; Wasserman v. Time, Inc., 1970, 138 U. S. App. D. C. 7, 424 F. 2d 920; Arizona Biochemical Company v. Hearst Corporation, 1969, D. C. S. D. N. Y., 302 F. Supp. 412; United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 1968, 9 Cir., 404 F. 2d 706; Bon Air Hotel, Inc. v. Time, Inc., supra.

Davis v. National Broadcasting Company, 1970, D. C. E. D. La., 320 F. Supp. 1070, discussed some criteria used in determining if the public interest test is applicable.

> "* * * *A person may become the subject of public interest within the meaning of that rule, although he does not seek to be one, and indeed attempts to avoid it.* Thus, a person called to testify unwillingly before a grand jury, a bystander at an event of public importance, or the family of a public official may well be public figures exposed to public comment that is protected by the privilege.
>
> "Hence, as expounded by the decision in *Bon Air,* the Fifth Circuit Rule is that *a publication about any matter of public interest is within the scope of the Times privilege,* and hence protected,

> absent a showing that the publisher knew that the statement was false or had serious doubt about its accuracy."

Rosenbloom v. Metromedia, Inc., 1971, 403 U. S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296, mentioned earlier in its lower court posture, was affirmed in a landmark United States Supreme Court case codifying with approval the numerous lower court expansions of New York Times to include matters of public interest. We feel this case is dispositive of our position and represents an authoritative codification of the doctrine of constitutional privilege.

The Rosenbloom facts concerned a police raid searching for obscene books. The court said,

> "* * * Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense. 'The guarantees for speech and press are not the preserve of political expression or comment upon public affairs.' Time, Inc. v. Hill, 385 U. S. 374 at 388, 87 S. Ct. 534, 17 L. Ed. 2d 456. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U. S. 88, 102, 60 S. Ct. 736, 744, 84 L. Ed. 1093 (1941)."

* * * *

"Moreover, the constitutional protection was *not* intended to be limited to matters bearing broadly on issues of responsible government. '[T]he Founders

* * * felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government.' Curtis Publishing Co. v. Butts, 388 U. S., at 147, 87 S. Ct. at 1987 (opinion of Harlan, J.)." (Emphasis supplied except for cites.)

* * * *

"* * * The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. * * * *We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern,* without regard to whether the persons involved are famous or anonymous." (Emphasis supplied.)

* * * *

"* * * '[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.' St. Amant v. Thompson, 390 U. S. 727, 732, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with *knowledge that it was false* or *with reckless disregard* of whether it was

false or not. Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech.' Garrison v. Louisiana, 379 U. S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)." (Emphasis supplied except for citations.)

The Supreme Court did not define with exactitude what is in the public interest.

> "* * * [w]hether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases." Rosenbloom, supra.

This is a state libel action and it is our delineation that the divorce of Mary Alice Firestone was an event of great public interest. It is even possible plaintiff was a public figure, but we need not go that far to substantiate our result. See Time, Inc. v. Johnston, September 13, 1971, 4 Cir., 448 F. 2d 378, for an interpretation of Rosenbloom's language concerning both public figures and events of great public interest.

The divorce trial in our case lasted seventeen months and there was much notoriety connected with it. Due to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.

The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. The fact that Time decided to publish news of the decree in the limited

space of its Milestones Column is in itself persuasively indicative of its great reader interest.

Given the divorce's inclusion as an event of great public interest, the only remaining question is one of malice. Only by so proving may plaintiff sustain a recovery. We can find no malice.

Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth.

The wording of the divorce decree was ambiguous. At least two reasonable interpretations were available—that plaintiff was found an adulteress as charged in the complaint, or that she was not an adulteress because of the incongruity of such a finding with an award of alimony.

The testimony at trial, some deemed too spicy for public sessions, implicated both parties in compromises to marital fidelity. The wording of the divorce decree itself would lead a reasonable person to conclude adultery had been committed, "[a]ccording to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr." Part of this language was reproduced exactly in Time's article.

In addition to Time's rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to

substantiate information. Plaintiff's attorney and the judge were called for verification.

It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it.

It is this court's conclusion that the judgment appealed from should be reversed. Time clearly falls under the New York Times umbrella of protection. The divorce of Mary Alice Firestone was an event of great public interest. There was no evidence of malice on Time's part.

The judgment is reversed and the cause remanded with instructions to enter a final judgment in favor of the appellant, Time, Inc.

Reversed and remanded.

REED, C. J., and OWEN, J., concur.

Supreme Court, U. S.
FILED
MAY 27 1975
MICHAEL

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-944

TIME, INC., PETITIONER,

v.

MARY ALICE FIRESTONE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR CERTIORARI FILED JANUARY 31, 1975
CERTIORARI GRANTED APRIL 14, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-944

TIME, INC.,

Petitioner,

v.

MARY ALICE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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March 12, 1968	Complaint (demand for jury trial).
March 12, 1968	Summons issued: (returned 3/29/68, served 3/26/68).
July 12, 1968	Answer and Affirmative Defense of Time, Inc.
August 23, 1968	Interrogatories to defendant, James A. Linen, President of Time, Inc.
September 4, 1968	Objection of defendant to interrogatories.
September 16, 1968	Motion of defendant for summary judgment with copy of final judgment of divorce in Firestone case attached.
September 16, 1968	Affidavit of Richard L. Duncan in support of motion.
September 16, 1968	Affidavit of George G. Daniels in support of motion for summary judgment.
September 16, 1968	Affidavit of Robert W. Delaney, Jr. in support of motion for summary judgment.
September 16, 1968	Notice of hearing on 10/8/68 at 4:00 p.m.
September 26, 1968	Order on defendant's objections to interrogatories.
October 17, 1968	Answers of Time, Inc. to interrogatories.
October 18, 1968	Affidavit of Joseph D. Farish, Jr. in re conversation with Robert W. Delaney, Jr.
November 15, 1968	Motion of Time, Inc. to strike affidavit of Joseph D. Farish, Jr.

November 15, 1968	Final Summary judgment granting Defendant's Motion for Summary Judgment.
November 20, 1968	Motion of plaintiff for rehearing.
November 29, 1968	Order that plaintiff's motion for rehearing is denied.
December 10, 1968	Notice of appeal, filed by plaintiff.
December 18, 1968	Assignments of error.
March 6, 1970	Mandate from the District Court reversing the final summary judgment of the Circuit Court, with opinion thereon.
March 11, 1970	Order directing pretrial procedure on June 1, 1970 and setting cause for trial before a Jury on July 13, 1970.
May 26, 1970	Pretrial statement of defendants.
June 9, 1970	Pretrial statement of plaintiff.
June 9, 1970	Pretrial statement of defendant.
June 9, 1970	Pretrial order setting cause for trial on Monday, July 13, 1970.
June 24, 1970	Motion of plaintiff for leave to amend ad damnum and notice of hearing on 6/30/70.
June 24, 1970	Motion of plaintiff to limit testimony at trial and notice of hearing on 7/10/70.
July 1, 1970	Order that motion of Farish and Farish, Esq., to withdraw is granted on basis of the grounds set forth therein and that plaintiff's motion for leave to amend ad damnum is granted.

July 7, 1970	Notice of hearing—July 10, 1970.
July 13, 1970	Trial by jury and swearing the following jurors: John C. Sailors Lucien A. Samyn Minnie B. Drew Charles J. Sheridan Adolph M. Shapiro Ruth McAllister
July 13, 1970	Swearing five (5) witnesses for plaintiff as follows: Joseph D. Farish, Jr., Rev. Daniel L. Griffin, Mary Blicher, John Casey and Alvin Murphy, M.D.
July 13, 1970	Plaintiff's Exhibit #1—An issue of Time Magazine dated December 22, 1967.
July 13, 1970	Plaintiff's Ex. #2—Copy of Final Judgment as rendered in case #64 C 2790 Mary Alice Firestone vs Russell A. Firestone, Jr.
July 13, 1970	Plaintiff's Ex. #3—Clipping from Miami Herald dated 12/16/67.
July 13, 1970	Plaintiff's Ex. #4—Copy of Dispatch from Delaney to Applegate dated 12/16/67.
July 13, 1970	Plaintiff's Ex. "A" for identification—Registered letter from Farish & Farish to Mr. James A. Linen, president Time, Inc. dated 12/26/67 with receipt attached.
July 13, 1970	Plaintiff's Ex. "B" for identification—Copy of letter from Farish & Farish to James A. Linen, president Time, Inc. dated 1/16/68 with receipt attached.
July 13, 1970	Defendant's Ex. #1—An Associated Press Release (withdrawn from interrogatories of James A. Linen, President Time, Inc.)

July 14, 1970	Swearing four (4) witnesses for plaintiff as follows: Ursula Nadasdy, George G. Daniels, William R. Doerner and Robert W. Delaney.
July 14, 1970	Plaintiff's Ex. #5—Checking Copy of item in Time Magazine.
July 14, 1970	Plaintiff's Ex. #6—Copy of message to Miami Bureau from Applegate dated 7/15/67. (previously plaintiff's exhibit "C" for identification).
July 14, 1970	Defendant's Ex. "A"—Identification—Newspaper copy of Miami Herald dated 7/14/70.
July 14, 1970	Defendant's Ex. "B"—Identification—New York newspaper clipping dated 12/15/70.
July 14, 1970	Defendant's Ex. "C"—Identification—Copy of memorandum of telephone conversation from Ursula Nadasdy to Duncan dated 12/16/67.
July 14, 1970	Defendant's Ex. "D"—Identification—Copy of message from Duncan to Applegate 12/16/67.
July 14, 1970	Defendant's Ex. "E"—Identification.
July 14, 1970	Defendant's Ex. #2 ("E" above) Copy of message from Duncan to Applegate dated 12/16/67.
July 14, 1970	Defendant's Ex. "F"—Identification—Copy of First Draft of subject item.
July 14, 1970	Defendant's Ex. "G"—Identification—Copy of final draft of subject item in Time Magazine.
July 14, 1970	Plaintiff's Ex. #7—Copy of memorandum of telephone conversation from Ursula Nadasdy to Duncan dated 12/16/67.
July 14, 1970	Plaintiff's Ex. #8—Copy of message from Duncan to Applegate.

July 14, 1970	Plaintiff's Ex. #9—Copy of first draft of subject item.
July 14, 1970	Plaintiff's Ex. #10—Copy of final draft of subject item in Time Magazine.
July 15, 1970	Plaintiff's Ex. #11—(previously entered as Plaintiff's Ex. "A" on 7/13/70).
July 15, 1970	Plaintiff's Ex. #12—(previously entered as Plaintiff's Ex. "B" on 7/13/70).
July 15, 1970	Swearing two (2) witnesses for plaintiff: Hon. James R. Knott and Mary Alice Firestone.
July 15, 1970	Defendant's Ex. "H" Identification—Article from Miami Herald dated 7/15/70.
July 15, 1970	Defendant's Ex. "I" Ident—Article from Palm Beach Times dated 7/14/70.
July 15, 1970	Defendant's Ex. "J" Ident—Article from Palm Beach Times dated 7/14/70.
July 15, 1970	Defendant's Ex. #3—Article—newspaper clipping New York News dated 12/15/70.
July 15, 1970	Plaintiff's Ex. "D" Ident—Time Inc. 1969 Annual Report containing Financial Statement.
July 16, 1970	Deputy Official Court Reporter's pretrial transcript of proceedings and testimony before the Court and a jury—delivered this date to Clerk's office 7/16/70.
July 16, 1970	Official Court Reporter's partial transcript of testimony and proceedings before the court and jury—delivered this date 7/16/70 to Clerk's office.
July 16, 1970	Official Court Reporter's transcript of proceedings before the Court—delivered this date 7/16/70.
July 16, 1970	Affidavit of Luis Bueno with copies of newspaper clippings attached—before the Court on 7/10/70.

July 16, 1970	Affidavit of Lois Wilson with attached copies of Newspaper clippings—before the Court on 7/10/70.
July 16, 1970	Order on plaintiff's Motion to Limit Testimony, etc.—Dated 7/13/70.
July 16, 1970	Motion of Defendant Time, Inc. for Directed verdict—before the court on 7/15/70.
July 16, 1970	Plaintiff's Requested Instructions.
July 16, 1970	Defendant's Requested Instructions.
July 16, 1970	Additional Defendant's Requested Instructions.
July 16, 1970	Court's Charges.
July 16, 1970	Verdict finding for plaintiff, Mary Alice Firestone and against Defendant, Time, Inc., assessing her compensatory damages in the sum of $100,000.00; further finding for plaintiff and assessing punitive damages in sum of $None. Adolph M. Shapiro, foreman.
July 22, 1970	Motion of Defendant for Directed Verdict.
July 22, 1970	Motion of Defendant for New Trial.
July 22, 1970	Notice of defendant of Filing with announcements of the Court attached.
September 8, 1970	Order that defendant's motion for directed verdict and motion for new trial are denied 9/8/70.
September 9, 1970	Final Judgment with Order that Plaintiff have and recover from the Defendant, Time, Inc. the sum of $100,000.00. Dated 9/9/70.
September 11, 1970	Motion of defendant for supersedeas on appeal and notice of hearing on 9/18/70.
September 16, 1970	Order that the defendant's motion is granted and the supersedeas bond is set in the sum of $115,000.00 9/16/70.

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA.

MARY ALICE FIRESTONE, *Plaintiff,*

vs.

TIME, INC., a Foreign corporation, transacting business in the State of Florida, *Defendant.*

Complaint

Now comes the Plaintiff, MARY ALICE FIRESTONE, by her undersigned attorneys, and sues the Defendant, TIME, INC., a Foreign corporation, transacting business in the State of Florida, and alleges as follows:

1. That the Plaintiff, MARY ALICE FIRESTONE, is over the age of twenty-one years and is a resident of Palm Beach County, Florida.

2. That the Defendant, TIME, INC., is a foreign corporation, conducting business in the State of Florida. That said Defendant edits, publishes, distributes and sells, throughout the State of Florida, a weekly periodical or magazine under the name of "Time", on Friday of each and every week.

3. That in the magazine "Time", under date of December 22, 1967, on page 77 under the heading "Milestones", the Defendant maliciously prepared, and composed of and concerning Plaintiff, a certain writing, to wit:

> "Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'"

That said writing was defamatory in nature and was published and circulated in the Defendant's magazine, and was distributed through the mail to all of the Defendant's subscribers and sold on the newsstands throughout the United States and foreign countries, including Palm Beach County, Florida, and was read by the Plaintiff.

4. That the Defendant meant, by the foregoing false and malicious words that the Plaintiff had been adjudged an unfaithful wife and an unchaste woman and that the Plaintiff had been guilty of the crime of adultery.

5. That the said defamatory matter communicated as aforesaid did, and was calculated to, cause great injury to Plaintiff's reputation in that it attempted to show she had been adjudged unfaithful and that a Court of competent jurisdiction had found that she had been guilty of the crime of adultery, although not convicted thereof.

6. That at the time of said defamatory publication, Defendant knew said words were untrue. That in making said defamatory publication Defendant acted with malice towards the Plaintiff.

7. That Plaintiff has always enjoyed a good reputation in the community and that said reputation has been damaged by said article.

8. That on or about January 19, 1968, Plaintiff demanded in writing a retraction by the Defendant on said defamatory statement; that following receipt of Plaintiff's said demand for retraction, Defendant did, and continues to, fail and refuses to comply with said demand.

WHEREFORE, Plaintiff claims compensatory damages in the amount of ONE MILLION ($1,000,000.00) DOLLARS and punitive damages in the amount of ONE MILLION ($1,000,000.00) DOLLARS, and demands trial by jury.

Jos. D. FARISH, JR.
Of Counsel

FARISH & FARISH
Denco Building
316 First Street
West Palm Beach, Florida
Attorneys for Plaintiff

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Answer and Affirmative Defenses

The Defendant, TIME, INC., answers the Complaint filed in this cause as follows:

1. Defendant admits the allegations of Paragraph 1.

2. Defendant admits that it publishes Time Magazine and that the same is sold in the State of Florida.

3. Defendant admits that on Page 77 of its December 22, 1967, issue it published the indented quotation in Paragraph 3 of the Complaint. Defendant denies that the article is defamatory. Defendant denies that the said article was or is malicious. Defendant admits that the magazine containing the said article was distributed to its subscribers and sold on newsstands in Palm Beach County and elsewhere. Defendant is without knowledge and denies that the article was read by Plaintiff and denies, in any event, that this is legally relevant.

4. Defendant again denies that the article is false or malicious, denies the conclusionary and speculative allegations as to what Defendant "meant" by the "said words," which speak for themselves, and further denies each and every allegation of Paragraph 4 of the Complaint.

5. Defendant again denies that the article was defamatory, denies that the article did, or was calculated to, injure Plaintiff's reputation, denies that Defendant "attempted to show" or do anything concerning Plaintiff by the article except to report to the public the rulings of a Circuit Court Judge of this County, denies that any reference, directly or indirectly, is made to any crime and denies each and every allegation of Paragraph 5 of the Complaint not expressly admitted herein.

6. Defendant is unable to determine which words Plaintiff alleges to be untrue but none of the words contained in the article were known to the Defendant to be untrue. Defendant denies that the article was defamatory, denies that the article was untrue, and denies it acted with malice towards Plaintiff at any time.

7. Defendant denies that Plaintiff has always enjoyed good reputation in the community and further denies that whatever reputation Plaintiff had was damaged by said article.

8. Defendant denies that Plaintiff has made a proper and adequate demand for retraction, admits that no retraction has been made, and further denies each and every allegation of Paragraph 8 of the Complaint.

Affirmative Defenses

Defendant denies each and every allegation of the Complaint not expressly admitted herein, and as affirmative defenses alleges as follows:

9. The Complaint in this cause fails to state a cause of action for which relief can be granted for the reasons set forth in Defendant's motions to dismiss and strike and also set forth in Defendant's memoranda of law filed in support of said motions. The grounds set forth in the said motions and memoranda are hereby expressly adopted and incorporated and are hereby asserted and alleged as affirmative defenses to this cause.

10. Whatever words Plaintiff complains of are privileged in that they constitute a simple report to the public of a matter of public records, to-wit: a judicial proceeding.

11. Whatever words Plaintiff complains of are privileged for the reason that they involve a public figure, a matter of public interest, or both.

12. Whatever words Plaintiff complains of are privileged by virtue of Defendant's rights under the First Amendment to the Constitution of the United States.

13. The article complained of is privileged in that it is the result of normal and reasonable news gathering and publishing procedures.

14. The article complained of is privileged in that it merely reports a judicial decision without commenting upon it and without adopting the opinions of the court.

15. Plaintiff has failed to perform a condition precedent to bringing such a cause of action by failure adequately to demand retraction.

16. Plaintiff is barred by estoppel from making this claim in that it contradicts the damage allegations made by her in a prior and pending lawsuit against this Defendant.

17. Plaintiff is barred from making this claim by estoppel in that, if any inaccuracies appear in the said article, they were the result of, directly or indirectly, or induced by, statements furnished by Plaintiff's agents, servants or employees.

18. The subject article was published without malice towards Plaintiff.

FRATES FAY FLOYD & PEARSON
Attorneys for Defendant
Twelfth Floor, Concord Building
Miami, Florida

By WM. S. FRATES
Wm. S. Frates
GUY B. BAILEY, JR.
Guy B. Bailey, Jr.

(Certificate of service omitted in printing.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Motion for Summary Judgment

Defendant, Time, Inc., moves this Honorable Court to enter an Order granting summary judgment in favor of Defendant and against Plaintiff.

As grounds therefor, Defendant would show unto the Court that the attached affidavits and exhibits of George G. Daniels, William R. Doerner, Ursula Nadasdy, Robert W. Delaney, Jr., and Richard L. Duncan, together with the pleadings, depositions, answers to interrogatories and admissions on file show that there is no genuine issue as to any material fact, and that Defendant is entitled to a judgment as a matter of law.

Wherefore, Defendant respectfully requests that the Court enter final summary judgment for Defendant and against Plaintiff.

Respectfully submitted,

FRATES FAY FLOYD & PEARSON
Attorneys for Defendant
Twelfth Floor Concord Building
Miami, Florida 33130

By WM. S. FRATES
William S. Frates
and GUY B. BAILEY, JR.
Guy B. Bailey, Jr.

Of Counsel:
Harold R. Medina, Jr.
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York

(Certificate of service omitted in printing.)

EXHIBIT—FINAL JUDGMENT, *Firestone* v. *Firestone*, DECEMBER 15, 1967.

(Plaintiff's Exhibit 2, reproduced *infra* p. 523.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Affidavit of Richard L. Duncan in Support of Summary Judgment

STATE OF FLORIDA
COUNTY OF DADE } ss.:

BEFORE ME, the undersigned authority, personally appeared RICHARD L. DUNCAN, who, being by me first duly sworn, deposes and says as follows:

1. I am presently and have been for two years Chief of the Caribbean Bureau of Time Magazine, located in Miami, Dade County, Florida.

2. I held the foregoing position on December 16, 1967.

3. On Saturday morning, December 16, 1967, I received a telephone call from the New York office of Time Magazine requesting information concerning the divorce proceedings between Russell A. Firestone and Mary Alice Firestone.

4. I had no prior knowledge of the story of the divorce and read the Miami Herald for that morning. I took notes on the Miami Herald story and returned the call to New York, giving them the basic outlines of the story as carried by the Herald.

5. I then called Robert Delaney, bureau stringer, and asked him to use his Palm Beach sources to confirm the story as reported by the Miami Herald. I asked him to do it that morning since Saturday was the deadline for the next issue of Time Magazine.

6. To the best of my knowledge, Delaney handled the confirmation directly with the New York office during the middle of the day.

7. The next contact I had with the New York office was a late afternoon inquiry concerning which party had been plaintiff and which had been defendant in the divorce action. I made a telephone call to Delaney and then returned the call to New York.

8. I did not know Mary Alice Firestone personally at that time and still have no personal acquaintance with her.

9. Throughout the entire time with relation to this story, I acted without any personal malice or other ill feeling towards any of the parties to the divorce suit. I was

given an assignment and fulfilled it to the best of my ability using our bureau personnel.

FURTHER AFFIANT SAYETH NOT.

RICHARD L. DUNCAN
Richard L. Duncan

(Jurat omitted in printing.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Affidavit of George G. Daniels in Support of Motion for Summary Judgment

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

GEORGE G. DANIELS, being duly sworn, deposes and says:

I am employed by defendant, publisher of Time Magazine, as a Senior Editor and was so employed in December 1967. I edited the MILESTONES item which appeared in the December 22, 1967, issue of Time which is the subject matter of this action and a copy of which is set forth in paragraph 3 of the complaint. The item was written by William R. Doerner, who was and is employed by defend-

ant. Prior to the time of the appearance of the item, I had never met Mary Alice Firestone and did not then and do not now bear any malice or ill will toward her.

In writing and editing the item, Doerner and I relied entirely on Time's file concerning Mary Alice Firestone which contained dispatches received at various times from the Miami Bureau, principally from Richard Duncan and Robert Delaney. They are reliable and competent reporters who have a long association with Time.

From dispatches from Duncan and Delaney and telephone conversations with them, we learned that they had checked the court files in connection with Mary Alice Firestone's divorce proceedings and had interviewed her attorney, Joseph D. Farish, Jr., and Judge Knott before whom the divorce proceedings had been held.

In brief, the MILESTONES Section of Time is devoted to encapsulized announcements of births, marriages, divorces, deaths and other such information concerning persons who by reason of position, family, or otherwise, are of interest to our readers. As the heir to a large fortune and the bearer of a proud family name associated with one of America's largest and most reputable corporations, Russell A. Firestone, Jr., is a person of such interest. Furthermore, the length of the divorce proceedings and the type of testimony adduced at trial made the divorce of Mary Alice Firestone of equal interest to our readers.

In checking the facts stated in the item here in question, I found that the divorce action had been reported in the public press and that the quotations from the judge's opinion as reported by Duncan and Delaney had also been reported in the local press.

Nevertheless, as indicated in the exhibit to the affidavit of Ursula Nadasdy, further efforts were made to check the accuracy of the reported statements and the facts pertinent to the divorce itself. Thus, the Miami Bureau was asked

to check the grounds on which the divorce was granted as stated by the judge, the date of the marriage, the birth date of both parties and their son, the amount of alimony, resolution of the custody of the child, and the correct spelling of the child's name. Delaney's cable dated December 16, 1967, reported in greater detail the data relevant to the divorce which had been requested. With all of that research in mind, I edited the article and approved its publication.

At the time I edited the article, I believed it to be true.

GEORGE G. DANIELS
George G. Daniels

(Jurat omitted in printing.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH

JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Affidavit of William R. Doerner in Support of Motion for Summary Judgment

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

WILLIAM R. DOERNER, being duly sworn, deposes and says:

I am employed by defendant, publisher of Time Magazine, as a Contributing Editor, and was so employed in December 1967. I am now assigned to the World Section,

although at that time my responsibilities were devoted to the preparation of items to be used in the MILESTONES Section. In that capacity I wrote an item which appeared in the MILESTONES Section of the December 22, 1967, issue of Time concerning the divorce of Mr. & Mrs. Russell A. Firestone, Jr., a copy of which is set forth in the complaint. Prior to that time I had no knowledge whatsoever of Mr. or Mrs. Russell A. Firestone, Jr., and had not met either of them.

During the latter half of 1967, I wrote many items which were included in the MILESTONES Section of Time Magazine. The MILESTONES Section is basically designed to give Time's readers a brief report on important events (births, deaths, marriages and divorces) in the lives of persons who by reason of occupation, family, interests, activities or otherwise, have become well-known and of great interest to at least a large segment of those readers. In writing an item for the MILESTONES Section there is no attempt made to describe the event in its fullest detail; rather, the item should be short, containing a statement of the relevant facts and perhaps a brief comment to put the facts in perspective. It was with that in mind that I wrote the MILESTONES item here in question.

After having been assigned to write the item, I directed the researcher, Ursula Nadasdy, to call Richard L. Duncan who, at that time, was Chief of the Caribbean Bureau, and was located in Miami, Florida. She reported to me the results of her investigation, including reports from the Miami Bureau of conversations Robert W. Delaney, Jr., had had with Judge Knott and with Mrs. Firestone's attorney. Her research activities are described in detail in her affidavit in support of this motion.

In writing the item, I relied entirely on Time's files concerning Mr. and Mrs. Firestone and on responses to

queries and dispatches received from Richard L. Duncan and Robert W. Delaney, Jr., of our Miami Bureau.

At the time I wrote the article I believed it to be true.

WILLIAM R. DOERNER
William R. Doerner

(Jurat omitted in printing.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Affidavit of Ursula Nadasdy in Support of Motion for Summary Judgment

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

URSULA NADASDY, being duly sworn, deposes and says:

I am employed by defendant, publisher of Time Magazine, as a researcher and was so employed in December 1967. My duties as a researcher include the verification of each fact in the article which is assigned to me.

After an editor or other author has written a draft of an article for publication in Time, a copy of that draft is sent to the Research Department, which is under the supervision of Marylois P. Vega, for verification of all facts

contained therein. Mrs. Vega then assigns a member of the Department to perform the actual research required on the article. I was so assigned to perform the necessary research on the item concerning plaintiff written by William R. Doerner for the MILESTONES Section of the December 22, 1967, issue of Time.

In researching the item, I called for the morgue files of Time Inc. concerning Mr. & Mrs. Russell A. Firestone, Jr. That file, including dispatches received from the Miami Bureau in connection with the item, is attached to this affidavit as Exhibit 1.

At the request of William R. Doerner, I called Richard Duncan, Chief of the Caribbean Bureau of Time. He said he did not know the details of the story and promised to return my call. Later that day he did return my call and gave me the outlines of an article on the divorce which had appeared in the Miami Herald that morning.

I had further telephone conversations with Robert W. Delaney, Jr., who has been associated with Time for many years and is a special-assignment reporter for the Miami Bureau. During the course of those telephone conversations, he told me that he had been in contact with Judge Knott and Mrs. Firestone's attorney, Joseph Farish, and reported to me the substance of those interviews. He also sent to New York dispatches (included in Exhibit 1) which set forth the relevant data concerning the divorce and answered my queries. My conversations with him and the dispatches confirmed the accuracy of the item.

It is a Time Inc. requirement that the reporter place a mark above each word to be checked to indicate that she has checked that word. The copy of the draft of article which came to me together with my notations made after checking the various facts is attached as Exhibit 2. As Exhibit indicates, in fact I did check each word, making the

necessary corrections and assuring myself that the item as returned was accurate in every respect.

As a result of my research at the time, I believed each statement which I had checked to be true and I believed that the item was true in every respect.

URSULA NADASDY
Ursula Nadasdy

(Jurat omitted in printing.)

gs
X - People - 7

From: Bette Pickett (stringer), Delray Beach
Received: NOV 19, 1964
WUAT7 DA COLLECT
DELRAY BEACH FLO 19 932A EST
ROBERT WINDLER, NEW YORK
TIME INC AUX AILA

D 43P

PEOPLE SUGGESTED: MARY ALICE FIRESTONE'S SEPARATE MAINTENANCE SUIT AGAINST HER HUSBAND, RUSSELL A. FIRESTONE, HEIR TO THE FIRESTONE MILLIONS WAS THROWN OUT OF COURT BY JUDGE CULVER SMITH ON MONDAY OF THIS WEEK. JUDGE SMITH SAID A PERSON DECLARED LEGALLY INCOMPETENT CANNOT FILE A SUIT AS AN INDIVIDUAL, BUT HE SAID A GUARDIAN COULD FILE A SUIT ON BEHALF OF MRS FIRESTONE.

THE 27 YEAR OLD WIFE OF RUSSELL A. JR. WAS DECLARED INCOMPETENT NOV. 2 BY COUNTY JUDGE PAUL T. DOUGLAS AFTER A THREE-MAN EXAMINING BOARD FOUND THAT SHE HAD SUICIDAL PROPENSITIES, MEMORY DEFECT EMOTIONAL INSTABILITY WITH SEVERE DEPRESSIVE EPISODES, AND THAT SHE HAD ATTEMPTED SUICIDE A WEEK EARLIER.

JUDGE SMITH AND DOUGLAS ARE BOTH JUDGES OF PALM BEACH COUNTY, FLORIDA.

YESTERDAY, JUDGE SMITH APPOINTED CHARLES TURNER, BROTHER OF MRS. FIRESTONE, AS HER GUARDIAN. TURNER, 757 ISLAND ROAD, PALM BEACH, PETITIONED THE COUNTY COURT TO HAVE HIS SISTER DECLARED INCOMPETENT. A BANK WILL BE APPOINTED AS GUARDIAN OF MRS. FIRESTONE'S PROPERTY.

ONE OF MRS. FIRESTONE'S ATTORNEYS SAYS THAT HE DOES NOT KNOW IF A NEW SEPARATE MAINTENANCE SUIT WOULD BE FILED BY TURNER ON BEHALF OF HIS SISTER. REGARDS

BETTE PICKETT DELRAY BEACH

1220P..

R WUAT7/NYK FVW 1222P..

Exhibit 1 to Nadasdy Affidavit 23

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jw
X - Milestones - 7

D-35

From: Pickett (stringer), Delray Beach
Recd: November 28, 1961

WUAT1 DL COLLECT
DELRAY BEACH FLO 28 1033A EST
ROBERT WINDELER, NEW YORK
TIME INC WUX ATLA
MILESTONES: MRS. RUSSELL A. FIRESTONE, JR. SUED HER MULTI-MILLIONAIRE HUSBAND FOR ALIMONY AND CUSTODY OF THEIR CHILD IN PALM BEACH COUNTY CIRCUIT COURT ON NOVEMBER 23RD. MRS. FIRESTONE ASKED FOR AN UNSPECIFIED AMOUNT FOR SEPARATE MAINTENANCE UNCONNECTED WITH DIVORCE. SHE ALSO ASKED FOR EXCLUSIVE CUSTODY OF THEIR 21-MONTH OLD CHILD, MARK ALLEN.

THE SUIT WAS FILED THROUG THE LEGAL GUARDIAN OF HER PROPERTY, THE BANK OF PALM BEACH AND TRUST CO. THE BANK WAS APPOINTED ON NOV. 23RD. MRS. FIRESTONE, THE FORMER MARY ALICE SULLIVAN, IS TWENTY-EIGHT YEARS OLD AND A FORMER PALM BEACH ELEMENTARY SCHOOL TEACHER.

IT IS ALLEDGED THAT FIRESTONE IS WORTH IN EXCESS OF TEN MILLION DOLLARS. IN THE SUIT MRS. FIRESTONE STATES THAT SHE WAS ABANDONED BY HER HUSBAND ABOUT OCTOBER 29TH AND THAT HE HAS FAILED TO PROVIDE FINANCIAL SUPPORT SINCE THEN. SHE POINTED OUT SINCE THE ABANDONMENT BY FIRESTONE THAT SHE HAS BEEN EVICTED FROM HER HOME, THAT UTILITIES WERE SHUT OFF FOR LACK OF PAYMENT AND NUMEROUS OTHER BILLS ARE PENDING. SHE FURTHER CHARGES THAT FIRESTONE TOOK THEIR CHILD AND SINCE HAS HELD HIM UNDER ARMED GUARD. SHE SAID SHE HAS BEEN ALLOWED TO SEE THE CHILD ONLY IN THE PRESENCE OF THE ARMED GUARD AND THE BABY SITTER HIRED BY FIRESTONE. SHE CLAIMS HER LIVING EXPENSES AT THE TIME SHE AND FIRESTONE SEPARATED WERE IN EXCESS OF $5,000 MONTHLY.

MRS. FIRESTONE WAS ADJUDGED INCOMPETENT ON NOV. 2ND AND ON NOV. 17TH HER BROTHER, CHARLES TURNER, WAS APPOINTED GUARDIAN OF HER PERSON.

REGARDS
BILLIE PICKETT DELRAY BEACH FLORIDA

24
Exhibit 1 to Nadasdy Affidavit

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X - People - 7 - Keogh D 44P

From: Pickett (stringer), Delray Beach
Date: February 11, 1965

RETURN TO [illegible]

WUAT8 COLLECT DELRAY BEACH FLO 11 902A EST
ROBERT WINDELER, NEW YORK
TIME INC WUX ATLA
PROFILE SUGGESTED: WEDNESDAY (FEBRUARY 10TH) MRS. SUSAN F. COCHRANE (SUSAN E. PHIPPS) SUED RUSSELL A. FIRESTONE, JR ; THE SUIT WAS FILED IN PALM BEACH COUNTRY CIRCUIT COURT. IT CHARGES THAT FIRESTONE ORALLY AGREED TO PURCHASE SOME 552 ACRES FROM MISS PHIPPS IN 1960 THE ACREAGE WAS TO BE USED AS GRAZING LANDS FOR HIS HORSES. HE FAILED TO FERTILIZE AND MAINTAIN THE LAND SHE ALLEGES. THE COURT HAVE BEEN ASKED TO GRANT A "JUST AND "EQUITABLE" RECOMPENSE.

AFTER ONE YEAR'S USE HE REMOVED HIS HORSES AND RETURNED THE LAND TO HER FAILING TO EXECUTE HIS ORAL AGREEMENT.

REGARDS

BETTE PICKETT DELRAY BEACH FLORIDA

941AMSKV

..

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..WTA 11/942..

EXHIBIT 1—QUERY TO MIAMI BUREAU, DECEMBER 15, 1967

(Plaintiff's Exhibit 6, reproduced *infra* p. 534)

EXHIBIT 1—COPY OF RECORDING, DUNCAN TO APPLEGATE, DECEMBER 16, 1967, 11:25 A.M.

(Defendant's Exhibit 2, reproduced *infra* p. 544)

EXHIBIT 1—ASSOCIATED PRESS DISPATCH, DECEMBER 15, 1967

(Defendant's Exhibit 1, reproduced *infra* p. 543)

EXHIBIT 1—NEW YORK DAILY NEWS ARTICLE, "FIRESTONE HEIR SHEDS 3D WIFE", DECEMBER 16, 1967

(Defendant's Exhibit 3, reproduced *infra* p. 545)

EXHIBIT 1—COPY OF RECORDING, DELANEY TO APPLEGATE, DECEMBER 16, 1967

(Plaintiff's Exhibit 4, reproduced *infra* p. 532)

EXHIBIT 1—COPY OF RECORDING, DUNCAN TO APPLEGATE, DECEMBER 16, 1967, 2:50 P.M.

(Plaintiff's Exhibit 8, reproduced *infra* p. 536)

EXHIBIT 1—NADASDY MEMORANDUM, DECEMBER 16, 1967

(Plaintiff's Exhibit 7, reproduced *infra* p. 535)

EXHIBIT 2—CHECKING COPY OF MILESTONES ARTICLE

(Plaintiff's Exhibit 5, reproduced *infra* p. 533)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Affidavit of Robert W. Delaney, Jr. in Support of Summary Judgment

STATE OF FLORIDA }
COUNTY OF DADE } ss.:

BEFORE ME, the undersigned authority, personally appeared ROBERT W. DELANEY, JR., who, after being duly sworn, upon his oath deposes and says:

1. For most of the last thirteen (13) years, I have been associated with Time, Inc., working for the last sixteen (16) months with the Miami Bureau as a special assignment reporter, or "Bureau Stringer."

2. In December, 1967, I knew of the Firestone divorce suit and the charges of extreme cruelty and adultery made against Mrs. Firestone by her husband, since the suit had been attracting great publicity in various newspapers and other media, and since both the principals were extremely well-known celebrities.

3. On Saturday morning, December 16, 1967, I read an article in the Miami Herald relating to the Firestone divorce, a copy of which is attached as Exhibit I.

4. Later in the morning, I received a telephone call from Richard Duncan, head of the Time Magazine Miami Bureau. He said he had been requested by the New York

Office to check out the wire service reports concerning the Firestone divorce, and asked me to do this.

5. The news deadline for Time Magazine is on Saturdays and I promptly made several telephone calls to West Palm Beach to investigate the news reports. Unable to reach Judge Knott, I called one of his neighbors, who confirmed that he was not at home.

6. I learned the names of the attorneys who had participated in the divorce case and called them to seek information concerning the divorce. My files reflect that I talked personally with Joseph D. Farish, Jr., attorney in the divorce for Mrs. Firestone. He confirmed the Miami Herald article and told me that the technical grounds for the divorce were extreme cruelty and adultery.

7. In the early afternoon, around 1:30 p. m., I made a telephone report to Time Magazine's New York office confirming that Mr. Firestone had obtained the divorce decree and that the grounds for the divorce were extreme cruelty and adultery.

8. Later that evening, Judge Knott returned my call. I went over the Miami Herald article with him. He read portions of his opinion to me. I was satisfied from this conversation that the information I had telephoned to New York was accurate.

9. I do not have, nor have I ever had, any personal relationship whatever with Mary Alice Firestone. I do not know her. I have no personal feelings toward her at all.

10. In this matter I was given an assignment. I went to work promptly on it. I did it professionally and to the

best of my ability. I acted without any malice or ill will of any sort toward any of the persons involved.

FURTHER AFFIANT SAYETH NOT.

ROBERT W. DELANEY, JR.
Robert W. Delaney, Jr.

(Jurat omitted in printing.)

EXHIBIT TO DELANEY AFFIDAVIT—MIAMI HERALD ARTICLE "FIRESTONE GRANTED DIVORCE; SHE VOWS FIGHT", DECEMBER 16, 1967

(Plaintiff's Exhibit 3, reproduced *infra* p. 530.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Defendant's Pre-Trial Statement

I.

The pleadings on which this case goes to trial are the Complaint and Answer and Affirmative Defenses.

II.

The issues involved are:

A. Whether the Firestones' divorce, including the opinion of the court with respect thereto, was a matter of public interest.

B. Whether the plaintiff was a public figure at the time of the publication by reason of prior publicity and/or by injecting herself into or being a party to a matter of public interest.

C. Whether the plaintiff has established with convincing clarity that the report of the Firestones' divorce, including the opinion of the court with respect thereto, was false and was made with actual knowledge of falsity or with serious doubts as to the truth of the publication, by the persons at Time, Inc., responsible for the publication.

III.

A list of the exhibits and documentary evidence which may be used at the trial of this cause is:

1. All exhibits listed by plaintiff.

2. The article complained of in this case from the issue of TIME magazine of December 22, 1967.

3. Associated Press dispatch of Firestones' divorce dated December 15, 1967.

4. Bob Delaney's dispatch with reference to the Firestones' divorce dated December 16, 1967.

5. Dick Duncan's dispatch with reference to the Firestones' divorce dated December 12, 1967.

6. Dispatch with reference to the Firestones' divorce dated November 19, 1964.

7. Dispatch with reference to the Firestones' divorce dated November 28, 1964.

8. Dispatch with reference to the Firestones' divorce dated February 11, 1965.

9. Dispatch with reference to the Firestones' divorce dated December 15, 1967.

10. Miami Herald article with reference to the Firestones' divorce dated December 15, 1967.

11. Dispatch with reference to the Firestones' divorce dated December 16, 1967.

12. Record of telephone conversation of December 16, 1967, with reference to the Firestones' divorce.

13. Column drafts of the article.

14. Final Judgment in Mary Alice Firestone v. Russell A. Firestone, Jr., Case #64C 2790C dated December 15, 1967, in the Circuit Court of the 15th Judicial Circuit of Florida.

15. Answer and Counterclaim of Russell A. Firestone, Jr., in Mary Alice Firestone v. Russell A. Firestone, Jr., Case #64C 2790C in the Circuit Court of the 15th Judicial Circuit of Florida.

16. All testimony taken in Mary Alice Firestone v. Russell A. Firestone, Jr., Case #64C 2790C in the Circuit Court of the 15th Judicial Circuit of Florida.

17. Motel bill, reservation card and American Express charge record from the Thunderbird Motel, Jacksonville, Florida, on or about July 11 to 13, 1964.

18. Newspress reports of the plaintiff from the Miami Herald, Miami News and Palm Beach Post.

19. All exhibits attached to depositions in this case.

IV.

A complete list of witnesses which defendant reserves the right to call at the trial of this case is:

1. All witnesses listed by plaintiff
2. Mary Alice Firestone, plaintiff
3. Charles Turner, 236 Pendleton Avenue, Palm Beach, Florida
4. Donald C. Ehrler, 1011 Harvey Building, West Palm Beach, Florida
5. Ted Keys, Jr., 425 La Altos Road, Palm Springs
6. Arthur J. Balletti, 1515 N. W. 7 Street, Miami, Florida
7. Arnold Clifford Perry, 1 N. E. 1st St., Miami, Florida
8. Jack Harwood, 242½ Royal Palm Way, Palm Beach, Florida
9. Edgar A. P. Kellerman, M.D., 205 Datura, West Palm Beach

10. William H. Everts, M.D., 1011 S. Flagler Dr., West Palm Beach, Florida
11. Russell A. Firestone, Jr., 601 N. Flagler Dr., West Palm Beach, Florida
12. Lorin Lamb, 32-59 42nd Street, Astoria, New York, N. Y.
13. John Buster, Racquet Club, Grand Bahama Island
14. John J. Timmins, 925 N.E. 23 Terrace, Pompano Beach, Florida
15. Essis Fernandez, Jr., 8405 Sanchez Road, Jacksonville, Fla. and Florida Theater Building, Jacksonville, Fla.
16. Alvin Rubin, 5865 Express Way, Jacksonville, Florida
17. Patricia Ann Howard, 2539 Lantan Avenue, Jacksonville, Florida
18. Robert Ashauer, 323 Osborne Road, Lantana, Florida
19. George G. Daniels, Rockefeller Center, New York, N. Y.
20. William R. Doerner, Rockefeller Center, New York, N. Y.
21. Ursula Nadasdy, Rockefeller Center, New York, N. Y.

22. Richard L. Duncan, 201 South Bayshore Drive, Miami, Florida

23. Robert W. Delaney, Jr., 940 N. E. 147 St., North Miami, Florida

24. Joseph D. Farish, Jr., Denco Building, 316 First Street, West Palm Beach, Florida

25. Judge James R. Knott, Palm Beach County Court House, West Palm Beach, Florida

26. Bette Pickett, Delray Beach, Florida

27. Librarians and/or custodians of Miami Herald, Miami News and Palm Beach Post.

FRATES FAY FLOYD & PEARSON
Twelfth Floor Concord Building
Miami, Florida 33130
Attorneys for Defendant

By WM. S. FRATES

Of Counsel:

Harold R. Medina, Jr., Esq.
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, N. Y. 10005

(Certificate of service omitted in printing.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Plaintiff's Pretrial Statement

In compliance with the Court's order dated March 11, 1970, setting pretrial conference and directing pretrial procedure, Plaintiff's counsel hereby serves the following information upon opposing counsel:

1. The pleadings on which this case goes to trial are the Plaintiff's complaint and Defendant's answer.

2. Statement of the issues to be tried are the negligence of the Defendant and the damages sustained by the Plaintiff.

3. The following exhibits will be presented:

Issue of TIME magazine—December 22, 1967

Interrogatories and answers of Defendant

Final Judgment of divorce dated December 15, 1967 In the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County. Case No. 64 C 2790-C

Letter to Defendant dated January 16, 1968

All exhibits listed by the Defendant

4. The names and addresses of the witnesses who may testify in the cause are as follows:

All witnesses listed by Defendant All parties to the cause

All persons listed in Plaintiff's and Defendant's answers to interrogatories and Depositions

Tom Daly
U. S. Highway #1
Jupiter, Florida

Alexis Obolenski, Jr.
Clarke Avenue
Palm Beach, Florida

John Casey
West Palm Beach Police Dept.
West Palm Beach, Florida

Donna Smith
220 Kawama Lane
Palm Beach, Florida

Maude Ives
319 Seaspray Avenue
Palm Beach, Florida

Robert Chadwell
Major Realty Co.
Orlando, Florida

Ann Butler
117 Clarke Avenue
Palm Beach, Florida

Betty Bush
Jupiter, Florida

Chuck Goppert
7640 Clark Road
Lake Clarke Shores, Florida

Phillip McMurtry
D-3, U.S. M.A.
West Point, New York

Jay Hogan
Box-D Little River Station
Palm Bay Club
Miami, Florida

Sandra Hoffman
Box-D Little River Station
Palm Bay Club
Miami, Florida

Burt Reynolds
c/o Sam Goldwyn Studios
1041 N. Formosa Drive
Hollywood, Florida

Jay Mitchell
1st Federal Mortgage Corporation
400 Royal Palm Way
Palm Beach, Florida

John Spassoff
149 Bloomfield Drive
West Palm Beach, Florida

Plaintiff reserves the right to call additional witnesses whose names are presently not available and as soon as same become available will notify defense counsel.

s/ Jos. D. Farish, Jr.
Of Counsel

Farish & Farish
Denco Building
316 First Street
West Palm Beach, Florida
Attorneys for Plaintiff
833-7766

(Certificate of service omitted in printing.)

In the
CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
In and For Palm Beach County, Florida

[SAME TITLE]

Affidavit of Luis Bueno

State of Florida
County of Dade } ss.:

Before Me, the undersigned authority, personally appeared Luis Bueno, who, being first duly sworn and cautioned, deposes and says:

1. That Affiant is the Librarian for the Miami Herald, which is a daily newspaper published in Dade County, Florida, and circulated throughout South Florida and the State of Florida.

2. That in the ordinary course of the business of said newspaper, clippings of prominent personalities and events are taken from the said newspaper and maintained in a library for reference work at future times.

3. That Affiant has searched the library clippings of said paper and has obtained therefrom the attached copies of clippings referring to Mrs. Russell Firestone, also known as Mary Alice Sullivan, prior to December 14, 1967; that the attached copies are true and correct copies and were published in said newspaper on the dates stamped on said clippings.

FURTHER AFFIANT SAITH NOT.

s/ LUIS BUENO
Luis Bueno

(Jurat omitted in printing.)

Mar 15, 1967

Firestone's 'Leaving' Related

MAR 16 1967

13D

By WENDY ROGERS
Herald Staff Writer

WEST PALM BEACH — The brother of Mary Alice Firestone took the stand Tuesday to testify against her husband Russell A. Firestone Jr. in a divorce-separate maintenance trial.

Charles Turner, a 28-year-old stockbroker, moved in whith his sister shortly before she was ajudged legally incompetent in November, 1964. He said he was in the Firestone home just a "couple days" when Russell "packed his clothes and said 'I'm leaving.'"

In December, 1965, Mary Alice was ajudged legally competent.

Turner said he moved in with the couple at the request of Mary Alice who was "really upset."

Turner said he and Mary Alice remained in that house "as long as we could," but that "Mr. Firestone said to get out of the house . . . he didn't say where to go, just to get out. Then one day we were evicted."

Shortly before the brief February, 1967, session of the stop-and-start trial, Turner said Firestone visited Mary Alice and their son Mark Allen, staying "quite a while."

That shortly before rumors of reconciliation were squelched by Firestone himself in a public statement.

Testimony from Turner will continue today.

The trial will determine if Firestone gets a divorce or if Mrs. Firestone gets $8,375-a-month separate maintenance and custody of their child.

Also testifying Tuesday was Economist Peggy Bieley, of Bieley, Wagner and Associates Inc., who showed the $8,375-a-month Mrs. Firestone wants is 25 per cent above the minimum, and 50 per cent of the maximum of her statistical equals.

In other words, she used government statistics related to a high-income urban family in the South, applying them to a "two-person Firestone family."

Such a family would have total monthly expenditures, she calculated, of a minimum of $6,765 and a maximum of $15,144.

In most instances, Mrs. Firestone's requests were in the middle or at the minimum level of the statistical expenditures. But for clothing expenses, Mary Alice wants $2,805, or 80 per cent more than the maximum average expenditure.

Several prominent Palm Beachers, including Mrs. Alexis Obelinsky and Mrs. Stephen Sanford, testified Mrs. Firestone is a "very good mother," that she "adores the child and shows it," and that the child is "enormously happy" with her.

MAR 16 1967

The Miami Herald
36-D Thurday, March 16, 1967

c

Firestone Tells Why He Moved

By BILL CHARNLEY
Herald Staff Writer

WEST PALM BEACH — Russell Firestone Jr. testified Wednesday that he did not have any love nor respect for his former wife Mary Alice, nor did he want a reconciliation.

He is suing his wife for divorce and custody of their son, Mark, on grounds of adultery and cruelty. She is suing him for $8,375 a month separate maintenance and child support.

When questioned why he didn't visit his son more often, he said that until last July, every time he visited the boy, "Mary Alice wanted to introduce me to other girls, and I didn't want to meet other girls."

"After July she wanted me to return but I do not want to do that. I have no respect for her," he said.

"I told her then: 'I have no further life with you. You have no more responsibility than a 14 or 15-year-old."

Asked why he moved from the 236 Pendleton Ave., Palm Beach, home about April, 1964 where he was living with his son Mark, Mary Alice and her mother, Mrs. Peggy Sullivan, Firestone said: "I had told Mary Alice many times she had to get her mother out of the house.

"She was drunk all the time, and the day I moved I came home from the office and she was so drunk she couldnt' take care of Mark . . . I had to take him to the home of friends.

'I moved to the Island Dr. house and she returned from Freeport and stayed at the Pendleton house two or three days, then came to Island Dr. I never saw Mrs. Sullivan again.

"When I left Island Dr., I left two or three days before the lease expired . . . I told Mary Alice to go back to Pendleton, that I was going to get a place of my own. That I couldn't respect her.

"At the island house the nurse and Mark were in the east bedroom, Mary Alice in the middle one and I stayed in the west bedroom. We only slept in the same bedroom in the fall of 1963 in New York and she complained about that."

Earlier, Wednesday morning, [illegible] from her eyes as her brother told the court she was 'a very good mother with a wonderful relationship with her son."

The brother, Charles Turner, 28, returned to the stand to complete testimony before Judge James Knott in an attempt to prove to the court that his sister is better suited to care for the four-year-old boy than his father, the tire and rubber heir.

In answer to a question by her attorney, Joseph Farish Jr., concerning Firestone's relationship with the child, Turner said: "There have been such few times I have seen them together. It is hard to say . . . but there is not the love there that my sister has for him."

The trial is expected to end sometime this week, but a decision by Judge Knott will probably not come until later.

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Exhibit to Bueno Affidavit

Mary Alice's Brother Testifies in Trial

PB

By WENDY ROGERS
Herald Staff Writer

WEST PALM BEACH — The brother of Mary Alice Firestone took the stand Tuesday to testify against her husband Russell A. Firestone Jr. in a divorce-separate maintenance trial.

Charles Turner, a 28-year-old stockbroker, moved in whith his sister shortly before she was ajudged legally incompetent in November, 1964. He said he was in the Firestone home just a "couple days" when Russell "packed his clothes and said 'I'm leaving.'"

In December, 1965, Mary Alice was ajudged legally competent.

MAR 15 1967

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Turner said he and Mary Alice remained in that house "as long as we could," but that "Mr. Firestone said to get out of the house . . . he didn't say where to go, just to get out. Then one day we were evicted."

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In most instances, Mrs. Firestone's requests were in the middle or at the minimum level of the statistical expenditures. But for clothing expenses, Mary Alice wants $2,805, or 80 per cent more than the maximum average expenditure.

Several prominent Palm Beachers, including Mrs. Alexis Obelinsky and Mrs. Stephen Sanford, testified Mrs. Firestone is a "very good mother," that she "adores the child and shows it," and that the child is "enormously happy" with her.

As Mrs. Sanford left the stand Tuesday, Mrs. Firestone leaped to her feet and told her "you were beautiful."

Ted Keys, a private investigator who teamed with another — Don Ehrler — to watch Russell for Mary Alice, told the court about listening to a bugging device in Firestone's office.

Once when Mrs. Firestone, her brother and Ehrler entered Russell's office and — according to Ehrler — caught the rubber fortune heir in a compromising position with a former secretary, Keys testified he heard "some giggling and laughing."

Keys added he heard "some type of zipper being opened."

As Firestone's attorneys rushed to object, Judge James R. Knott dryly commented, "It might have been a suitcase zipper."

In the courtroom Tuesday, Mrs. Bieley explained her maintenance statistics thusly:

Food, alcoholic beverages and tobacco (typically 15.2 percent of total expenses): statistical range $1,028 to $2,302; Mary Alice's request, $1,060.
Housing (shelter, utilities and operation of household (25.1 percent): range $1,698 to $3,801; request $1,700.
Clothing and clothing service (10.2 percent): range $690 to $1,545; request $2,805.
Transportation (14.4 per cent): range $974 to $2,181; request $325.
Medical care (5.4 per cent): range $365 to $818; request $575.
Personal care (2.3 per cent): range $156 to $348; request $238.
Reading and education (3.9 per cent): $264 to $591; request $360.
Recreation (3.5 per cent): $237 to $530; request $700.
Gifts and contributions (9.7 per cent): range $695 to $1,469; request $350.
Other (3.5 per cent): $697 to $1,560; request $950.

March 15, 1967

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In Firestone Trial

By BILL CHARNLEY
Herald Staff Writer

WEST PALM BEACH — One witness in the Firestone divorce-separate maintenance trial committed perjury and another was promised $20,000 for his aid, Russell Firestone's attorneys charged Thursday.

The perjury charge was leveled at Joyce Jane Simms Nicholson, one-time secretary for Russell Firestone, after her husband, James T. Nicholson III, of Rockville, Md., presented a letter identified as written by his wife which said: "I lied on the deposition to help Mary Alice get her baby because I can imagine what it's like to be without your baby."

The letter was dated last June, after Mrs. Nicholson gave two sworn depositions, but before she testified before Judge James Knott in closed court.

Upon hearing of the letter, Judge Knott told Firestone's attorney Robert L. Floyd he should take it to County Solicitor Marvin Mounts "for action for perjury before the youth leaves, so we will know where the original is." The original letter is introduced in evidence in Maryland where Nicholson, 19, is seeking an annulment of his April 3, 1966 marriage to the woman.

After the trial recessed, County Solicitor Mounts met with the clerk of circuit court to examine testimony heard Thursday. He declined to say whether he is considering any formal charges of perjury.

"I think it would be unfair for me to make any statement at this time," Mounts said.

The charge that Mary Alice and her attorney, Joseph Farish Jr., had offered $20,000 for investigative services and testimony was made by Thomas E. Murphy of 901 NW 91st St., Miami, in a deposition taken from him last Dec. 21, but introduced in open court Thursday.

In the deposition, Murphy said when he asked Farish and Mrs. Firestone for the money, Farish told him: "I've got you in the courtroom . . . you can go to hell." hell."

On the witness stand, Firestone testified he met Murphy in Panama City, Panama last Nov. 10 during a business trip.

"I was down there on oil leasing business and Murphy happened to know one of the people at my table. He talked to me about buying some hunting property and I told him I wasn't interested, only in oil land."

Under cross examination by Farish, Firestone admitted Miss Myrna O'Dell, former Miami and West Palm Beach society columnist, had flown to Panama City and back at the same time.

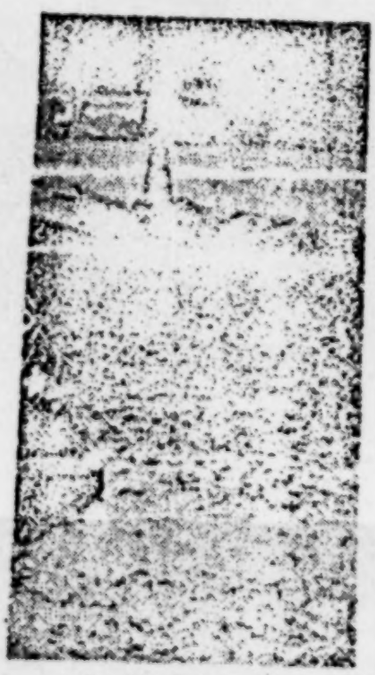
"She was doing an article. I bought my ticket, I don't know who bought hers. I saw her one time in the lobby of a hotel. We met after we completed our separate business .... I stayed with friends, I think she stayed at a motel at the airport. We came back on the same plane about three days later," Firestone said.

In a countersuit to his wife's bid for $8,375-a-month separate maintenance and child support, Firestone is suing for divorce and the custody of their four-year-old son, Mark, on grounds of adultery and cruelty.

Attorneys for both sides have rested their cases and said Thursday they would need approximately three hours each for oral arguments.

Testimony involving attorney's fees has been scheduled for 2:15 p.m. today in Judge Knott's chambers.

March 17, 1967.



—Herald Staff Photo by BOB EAST

Alpha Tau Omega fraternity couple of canoers unused to waters with mammals, mansion

Firestone Wife Wins Praise

12a

By DAVE SIMMS
Herald Staff Writer

WEST PALM BEACH — Witnesses for Mary Alice Firestone said in court here Monday she is better suited to care for her four-year-old son, Mark, than the boy's father, tire and rubber heir Russell Firestone Jr.

Mrs. Firestone's attorney in the divorce trial, Joseph Farish Jr., called to the stand a former governess for the boy, a church nursery school attendant and a close friend of the attractive, 30-year-old mother.

Mrs. Bess Collins, who was in charge of Mark from June to December 1965 when he was in his father's custody, said Firestone did not "voluntarily show any affection" for the boy during the six months.

"He (Firestone) seemed to be quite busy and preoccupied most of the time," Mrs. Collins said.

While Firestone was home only one or two days a week, she said Mrs. Firestone visited the child for an hour each day except during a short period when Mark was ill.

Mother and son were "very attached with each other and very upset when they had to depart after the hour's visit," Mrs. Collins said.

"I feel the child should be with his mother . . . unless, of course, they (Russell and Mary Alice) get back together," she added. "Mr. Firestone is a busy man and doesn't have the time to give."

Firestone let Mrs. Collins go, she said, just after Christmas 1965 when he found out she was going to testify for Mrs. Firestone.

March 14, 1967

FEB 11 1967

Saturday, Feb. 11, 1967 THE MIAMI HERALD 17-A

Firestone Reconciliation Discounted

By WENDY ROGERS
Herald Staff Writer

WEST PLAM BEACH — Russell A. Firestone, Jr. issued a written statement Friday squelching the rumors of reconciliation that have surrounded the Firestone separation-divorce trial.

Firestone issued the statement after more than a week of rumors, preceding and during the three-day trial session. Friday morning's session was closed, while the court heard testimony from a psychiatrist who had treated Mrs. Mary Alice Firestone.

Again Friday afternoon, the courtroom was closed for testimony by a second psychiatrist. In open court, Russell's mother and step-father, Mr. and Mrs. John Galbreath, testified briefly.

After recessing Friday, the separation-divorce trial won't resume until March 13.

The rubber heir issued this statement:

"As a result of continuing efforts on the part of my estranged wife Mary Alice Sullivan Firestone to imply to newspapers and television that a reconciliation is impending between us, I find it necessary to state that there is absolutely no possibility of a reconciliation.

"Three months after our separation, she filed for separate maintenance, and I countersued for divorce on the grounds of adultery and drunkenness, asking for custody of our son Mark.

Reconciliation "rumors are unfounded in truth" Firestone concluded.

Firestone handed copies of the statement to the press during the noon break in the Circuit Court trial and told The Herald "these facts are all true."

Told of her husband's statement, Mary Alice, who spent much of the day outside the courtroom said she does want a reconciliation.

"I love him ....." she said. "I am going to fight for him to the very end."

"He's my first and only husband, and the father of my child," she continued.

"There's no price on my feeling for him," she said. "Both my son and myself need him."

In Circuit Court Friday, the two psychiatrists for Mary Alice — Dr. Edgar Kellerman and Dr. William H. Everts — both wanted a closed session, and after attorneys conferred at the bench, they each got it.

Testimony focused on Mrs. Firestone's mental and physical condition during the period in 1964 between the February auto accident in which she was severely injured, and the November court hearing when she was adjudged mentally incompetent. At another hearing in December, 1965, Mary Alice was adjudged competent.

Immediately after Dr. Kellerman entered the court Friday morning, Mary Alice burst into tears and left the room.

Outside the courtroom, she regained composure only to cry again. For once she had forgotten the sunglasses she usually brings to court.

For the rest of the day, until the Galbreath testimony, Mary Alice stayed outside the courtroom.

She was not present to hear Dr. James F. Cooney, a neurosurgeon, who treated her immediately after the February, 1964, car accident, and later "absolutely" recommended psychiatric treatment.

Dr. Cooney described Mrs. Firestone's injuries, that included a skull fracture, and cerebral concussion. Among the results of her injuries, he described her loss of smell and taste and facial paralysis that gradually subsided.

A patient with her condition may remain "emotionally liable" for a period of months he said, later explaining he meant the "opposite of stable."

The trial will determine if Mrs. Firestone wins separate maintenance or if Firestone is awarded a divorce.

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FEB 10 1967

FEB 10 1967

Blonde Takes Stand In Firestones' Trial

By WENDY ROGERS
Herald Staff Writer

WEST PALM BEACH — Miss Myrna Odell, former Palm Beach and Miami newspaper woman, was called to testify Thursday in the Circuit Court separation-divorce trial of Mary Alice and Russell A. Firestone Jr.

Twice before Miss Odell, an attractive blonde, took the stand, she was identified face-to-face by two private detectives as the woman they saw in a compromising position with Firestone at his home on Barton Ave., Palm Beach, on New Year's Eve, Dec. 31, 1965.

The private detectives, Arthur Balletti and Arnold Clifford Perry, were called by Mrs. Firestone's attorney, Joseph Farish. They testified they had been hired by Russell to shadow Mary Alice, then living apart from her husband.

That New Year's Eve, Balletti — and later Perry — told the court they were watching Mary Alice's residence but went to Firestone's residence nearby several times to make sure he was standing by for a possible raid on her.

Balletti said he knocked on the door of the Firestone residence, got no answer, then looked through a window. He said he saw Miss Odell and Firestone in bed together with a sheet over them. Perry corroborated Balletti's testimony.

Miss Odell denied on the stand that she had ever been in bed with Firestone or had sexual relations with him.

The trial will decide whether Mrs. Firestone wins separate maintenance and child support or Firestone wins a divorce on grounds of cruelty and adultery.

Firestone's attorney, Robert L. Floyd tried to discredit the detectives' testimony and show conflicts in it. He elicited testimony from them that showed discrepancies in the time they claimed they saw the couple in bed.

After a court recess, Floyd produced a Balletti-to-Firestone report that allegedly showed Balletti tangled with Mary Alice, her brother and a detective she'd hired at her house and was taken to the police station at about the time he claimed to have seen Firestone and Miss Odell together. Floyd also said Ballett wanted payment from Firestone.

Miss Odell, who appeared Thursday in court wearing a navy coat with white pinstripes and a scarf, told how she first met Russell Firestone during an interview, at his attorney's office, in September, 1965.

She verified testimony given Wednesday that she and Firestone went out socially on a number of occasions in Palm Beach and Miami. While she was living in Palm Beach, she said, he visited her "possibly once a week" after early November, 1965.

Throughout questioning by Mrs. Firestone's attorney, which continued after lunch Thursday afternoon, Miss Odell remained calm. She answered only specific questions about various times she and Firestone were together. Among them was a birthday party for him in Ohio — where she was on a family holiday, she testified and in Panama, where she said she was doing a freelance newspaper article.

Over the "strenuous objections" of Firestone attorneys in Thursday afternoon's session, Miss Odell was classified by the court as an "adverse witness." That move allowed Farish to ask her "leading" questions.

After that, Miss Odell denied that Firestone bought her dresses, or a Christmas wrist watch.

Later, Miss Odell's father, Peter Odell of Miami, took the stand to say he has a "business relationship" and "friendship" with Firestone. He said he owns a Miami apartment building in which Firestone will one day become a partner. Odell testified Firestone has about $50,000 invested in the building, "secured" by the agreement for future partnership.

Both Miss Odell and her parents now reside at the building, the Harbor Hill Club.

Odell described his daughter and Firestone as "friends . . . good friends."

Later, his wife, Mrs. Olive Odell, described the pair as "closer than just friends," then added, "but they have a friendly relationship."

Feb 8, 1967

Firestone Testimony Resumes

By MONA MORRIS
Herald Staff Writer

WEST PALM BEACH — Russell A. Firestone Jr. and wife Mary Alice will be back in court today for another round in the divorce proceedings that have been the scandal-mongers' delight for more than a year.

Three days of testimony have been crowded into the court calendar this week. Another week has been set aside for the hearing beginning March 13.

FEB 8 1967

The petite, dark-haired Mrs. Firestone began her legal fight for separate maintenance in 1964. The first suit filed was thrown out of court because Mrs. Firestone had been ruled mentally incompetent.

The incompetency ruling came about six months after Mrs. Firestone had suffered severe head injuries in an auto accident. She was adjudged mentally competent again in December 1965.

Firestone, heir to the tire and rubber fortune, has countersued for divorce.

During the first week of the trial last July, the courtroom overflowed with witnesses and spectators on the rare occasions when anyone except court officials, the principals and their legal advisers were allowed inside.

Most testimony has been behind closed doors. Another day's testimony was presented last November, after a week had been set aside for the case. Court sessions were postponed because Mrs. Firestone was ill.

Custody of the Firestones' son, four-year-old Mark Allen, is at stake. Both sides have presented testimony about alleged indiscretions on the part of the other partner in the six-year marriage.

Exhibit to Bueno Affidavit 43

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FEB 9 1967

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Exhibit to Bueno Affidavit

I Spied on Firestone, Private Detective Says

By WENDY ROGERS
Boca Raton Bureau Chief

WEST PALM BEACH — Tales of electronic eavesdropping and peeking through a doorknob hole came in Circuit Court Wednesday from a private detective who shadowed Russell Firestone Jr.

Don Ehrler, of West Palm Beach, told how he bugged Firestone's office in the Harvey Building and how he, Mrs. Mary Alice Firestone and her brother Charles Turner once caught Firestone in a compromising position with his former secretary, Joyce Sims, on an office couch.

Photographs taken by Ehrler at the time (June 4, 1965) were entered into evidence Wednesday as the scandal-ridden trial resumed.

Mary Alice Firestone wants to remain Mrs. Firestone, with $8,700-a-month separate maintenance and custody of their child, four-year-old Mark Allen. Firestone is seeking divorce on grounds of cruelty and adultery.

Ehrler, who spent all morning on the stand, said he observed Firestone and his secretary for several months through an "old-fashioned doorknob hole" from the adjacent office. He saw them "necking" on several occasions, Ehrler testified.

Ehrler also told the court of following Firestone on visits to the home of his former wife, and much more recently of seeing him with Miss Myrna Odell of Miami.

On cross examination by Firestone's attorney, Robert L. Floyd, Ehrler was asked to deliver up all his reports to Mrs. Firestone and her previous attorney in the case. Floyd said he wanted the record "to show up obvious discrepancies" in Ehrler's testimony.

Early in the morning, Firestone's attorneys moved several times to have the press and public barred again from the courtroom because of the nature of the testimony and because they have been evicted many times before in the lengthy stop-and-start trial.

Judge James R. Knott decided the press could stay. The main reason he gave was that barring the public gave a "much worse impression" of the trial than the nature of the testimony itself would have.

It is "like excluding the public from details of a bath Nero took," the judge commented.

He said it is the public's "natural conclusion" that testimony must be highly scandalous if it must be heard in secret, "which is indeed the truth on some occasions." But mainly, he noted, much of the testimony given behind closed doors has been "innocuous."

Rumors about reconciliation of the two, who have been battling in courts since 1964, definitely gained no substance in the courtroom Wednesday. During the morning recess, however, the principals in the case spent nearly 15 minutes chatting beside the water cooler in the corridor.

The afternoon session resumed with the calling of Alfred Lee, a commercial supervisor for Southern Bell Telephone Co. in Miami. Attorneys for Mrs. Firestone asked him to produce records of service to the residence at 2525 Sunset Dr. in Miami Beach, from April 1 through the summer months, in the name of R. E. Hall.

The Miami Beach address is the one where a warrant was served on Miss Odell last August. In the warrant, Mrs. Firestone charged her with fornication and lewd and lascivious behavior — charges which later were thrown out of court by a Miami justice of the peace.

Mrs. Firestone Ruled Competent By County Judge

DEC 17 1965

By JOHN VAN GIESON
Herald Staff Writer

WEST PALM BEACH — County Judge Paul Douglas ruled Thursday that Mary Alice Firestone, wife of the tire fortune heir Russell A. Firestone, is legally competent.

The same judge declared her legally incompetent on Nov. 2, 1964. Mrs. Firestone will use her regained competency, to pursue her separate maintenance suit against her husband.

Atrorney Joseph A. Farish Jr., who represented Mrs. Firestone in the hearing before Judge Douglas, said he and flamboyant Attorney Melvin Belli will meet here beteeen Christmas and New Year's to discuss the suit.

Belli is the controversial San Francisco lawyer whose famous clients include Jack Ruby, the killer of accused assassin Lee Harvey Oswald. Belli also defended the pasties-wearing waitresses in a Dania night club.

Farish and Belli will seek and custody of the couple's two-year-old son, Mark Allen, for Mrs. Firestone, a 29-year-old black-haired beauty who used to teach school in West Palm Beach.

Mrs. Firestone first filed a separate maintenance suit against her husband on Nov. 18, 1964, but it was dismissed three days later in Circuit Court. Firestone countered with a suit for divorce.

A second separate maintenance suit was filed in behalf of Mrs. Firestone on Nov. 23, 1964 by Bank of Palm Beach and Trust Co. Vice President Paul Schmidt. The bank, at the time was financially responsible for her.

That suit charged that Firestone took Mark Allen from the family's Palm Beach home in October, 1964 and limited Mrs. Firestone's visits with the boy to two hours a day in the presence of an armed guard.

Thursday's ruling makes Mrs. Firestone again responsible for herself. J. Luther Drews had assumed her financial responsibility and her brother, Charles Turner, was personally responsible.

The competency hearing was a short one. Among the evidence presented in behalf of Mrs. Firestone were the favorable reports of two psychiatrists.

NOV 11 1965

Mrs. Firestone Calls Witnesses In Divorce Trial

By BILL CHARNLEY
Herald Staff Writer

WEST PALM BEACH — A pair of mystery witnesses and a Miami Beach postman were key figures in the Firestone divorce trial as the case reopened in Circuit Court here Thursday.

Courtroom participants were mum about the identities of the mystery witnesses — a young blonde woman who testified in the morning, and a man who testified for the first hour of the afternoon session before Judge James R. Knott.

The public and the press were barred from the trial most of the time as they were during most of the first week of testimony last July.

When participants emerged to the corridor — during a recess, Joseph Farish Jr., attorney for Mrs. Russell A. Firestone Jr., said "I'm not blushing, but they are," referring to the rubber heir and his legal battery.

He refused to identify the trim, five-foot-two-inch, blue-eyed mystery woman who had just testified for Mrs. Firestone's side.

He said, however, that most of the time had been taken up by cross-examination of the woman by Robert Floyd, Firestone's chief legal adviser.

When they had completed their testimony, both the mystery blonde and the mystery man slipped out of the courtroom by a rear door.

The first witnesses heard in open court were Miami Realtor Mooney Futch and his assistant Miss Kay Best, both of whom identified Firestone as the Russell Hall to whom their firm had rented a home at 2525 Sunset Dr., Sunset Island Number Two, Miami Beach, for $8,000 last April.

That is the residence at which late last August deputy constables served Miami divorcee Mrs. Myrna Odell with three warrants, signed by Mrs. Firestone, charging fornication, adultry and lewd and lascivious behavior.

The postman called by Farish was James Mooney, of Hialeah, who works out of the Ocean View Beach post office, and who delivers mail to 2525 Sunset Dr.

He told the court he had on three occasions delivered mail at that address for Mrs. Odell, once a letter addressed to Russell Firestone Jr. and an unknown quantity of mail to Russell Hall.

On one occasion he said he handed the mail to a white woman in the courtyard, and also told a man he identified in court as Firestone that there was mail in the box.

Also called as witnesses for Mrs. Firestone's side were four security guards employed to protect the entrance to Sunset Islands. One, Philip Sklar, of 14150 NE 16th Ct., Miami Beach, identified Firestone as a man who had driven onto the island in several cars.

Mrs. Firestone, whose illness delayed resumption of the trial for two days, was not in court Thursday. But while the trial was in progress, she was released from Good Samaritan Hospital, where she was admitted Monday.

Exhibit to Bueno Affidavit 45

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Exhibit to Bueno Affidavit 46

Wife May Not Appear

Judge OKs Testimony In Firestone Hearing

NOV 10 1966

OF

Herald Bureau

WEST PALM BEACH — Testimony will be taken today in the Firestone divorce trial in Circuit Court here, although Mrs. Russell A. Firestone Jr. is not expected to appear.

alice

The trial was set to reopen last Monday. However, Mrs. Firestone became ill and a postponement was requested. She has been in Good Samaritan Hospital since Monday.

In a hearing Wednesday, Joseph Farish Jr., attorney for Mrs. Firestone, argued to have the trial reset to a later date.

Circuit Judge James Knott ruled to have testimony taken for one day. It's possible the trial may extend to Friday and Saturday, although Friday is a holiday.

Mrs. Firestone is suing her husband, heir to the tire company fortune, for separate maintenance. He has filed countersuit for divorce.

Mail Sent After Stories

alice

Herald Bureau

WEST PALM BEACH — The delivery of mail to 2525 Sunset Dr., Sunset Island No. 2, Miami Beach, was the subject of testimony in the Firestone divorce trial in Circuit Court here Thursday.

Postman James Mooney who delivers mail to 2525 Sunset Dr. was a witness. During testimony he told Joseph Farish Jr., attorney for Mrs. Russell A. Firestone Jr., that he had on three occasions delivered mail there addressed to Miss Myrna Odell, a letter addressed to Russell Firestone Jr., and an unknown quantity of mail addressed to Russell Hall.

Under cross-examination by Robert Floyd, Firestone's chief legal adviser, Mooney said he delivered the mail addressed to Miss Odell late in August after newspaper stories stating Miss Odell had been served three warrants, signed by Mrs. Firestone, outside the residence.

The charges in the warrants were dismissed by Justice of the Peace Jason Berkman in Miami in September.

Nov 12, 1966

Judge OKs Firestone Case Delay

NOV 8 1966

alice

Herald Bureau

WEST PALM BEACH — A postponement was granted Monday in the Firestone divorce case after attorneys for Mrs. Russell A. Firestone Jr. reported that she is ill.

The divorce suit was scheduled to reopen in Circuit Court here Monday. Mrs. Firestone was taken to Good Samaritan Hospital early Monday morning with what was described as a stomach ailment.

mary alice

A hearing will be held Wednesday afternoon before Judge James R. Knott. It will be decided then whether Mrs. Firestone is well enough to continue or whether the trial will be postponed.

Mrs. Firestone is suing her husband, heir to the rubber fortune, for separate maintenance and child support. Firestone has filed a counter suit for divorce.

The trial opened last July and after a week's testimony was recessed until Monday.

--- Nov 8, 1966

Firestone Divorce Case Enters S

By MONA MORRIS
Herald Staff Writer

WEST PALM BEACH — The pungent smell of scandal among the moneyed will bring curious spectators to the Palm Beach County Courthouse again today as the Firestone divorce trial reconvenes.

The charges of scandal are being tossed back and forth between Russell A. Firestone Jr., heir to the rubber company fortune, and his wife Mary Alice as they seek to go their separate ways.

Firestone wants this way to be divorce. Mrs. Firestone, who filed first, wants separate maintenance and child support. She has asked $8,700 a month as the price of parting.

Also in question is which of them will get custody of their son, three-year-old Mark Allen.

Months of legal in-fighting ended in a trial last July. After a week's testimony — most of it behind closed doors — Judge James R. Knott recessed the trial and squeezed a full second week for the proceedings into the crowded court calendar.

During the interim, the case has not been quiet. In August, Mrs. Firestone signed warrants charging a Miami Beach divorcee with fornication, adultery and lewd and lascivious behavior.

FIRESTONE MARY ALICE

The charges were dismissed after a hearing in a Miami Justice of the Peace court.

From this incident, a countercharge of contempt of court was filed by defense attorneys. Mrs. Firestone had testified in J. P. court that she and her attorney Joseph Farish Jr. had been watching

Firestone's attorneys say she was really watching Firestone and that this is in violation of an order of last

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To Rule Later on Contempt

Stop Spying on Each Other, Judge Warns Firestones

By MONA MORRIS
Herald Staff Writer

WEST PALM BEACH — Judge James R. Knott, who will rule later on a contempt of court motion against Mrs. Mary Alice Firestone, warned both Firestones Thursday against spying on each other.

Attorneys for Russell H. Firestone Jr. had filed the contempt charge. It alleges that through testimony before a Miami justice of the peace, Mrs. Firestone admitted that she and her attorney, Joseph Farish Jr., had been keeping Firestone under surveillance last September. A court order last January forbade such activities.

Judge Knott took the motion under advisement. He said he would have to study the legal points of evidence and proof brought up at the hearing Thursday.

He warned the Firestones that if the actions alleged in the contempt charge actually did occur, he would consider this to be contempt.

"I don't propose to have my order violated with impunity, and if I find that it was I'm not going to overlook it," Judge Knott emphasized.

Judge Knott pointed out that the order was issued at the request of the attorneys in the case. He included attorneys and all those connected with the Firestones in his warning. In reference to Farish's alleged part in the surveillance, the judge said, "It would be most belittling to the dignity of the legal profession if this event did occur."

Attorney Farish argued that the contempt motion lacked sufficient evidence. He cited a case in which affidavits of persons having personal knowledge of the contempt were required as evidence. He said that Firestone's affidavit and the transcript of justice of the peace court proceedings did not constitute personal knowledge.

Firestone's attorney, Robert L. Floyd, said the only ones who could supply this personal knowledge of the alleged spying were Mrs. Firestone and Farish. He asked to be allowed to take their testimony.

Judge Knott said he would take testimony later, after reviewing the legal arguments.

Mrs. Firestone's suit for separate maintenance and child support and Firestone's countersuit for divorce will reconvene in circuit court Nov. 7. The trial was recessed last Juy.

Oct 21, 1966

On Contempt Charge

Skirmish Coming Up In Firestone Battle

Herald Bureau

WEST PALM BEACH — Another skirmish in the divorce battle of Russell A. Firestone Jr. and his wife, Mary Alice, will be fought in Circuit Court today.

In legal language, a hearing will be held on Firestone's motion to have his wife and her attorney declared in contempt of court.

Firestone says that Mrs. Firestone and attorney Joseph Farish Jr. disobeyed a court order forbidding both parties to harass or spy on the other. The hearing before Judge James R. Knott will be at 2:30 p.m.

Mrs. Firestone is suing for separate maintenance and child support; Firestone is countersuing for divorce. The case, which came to trial in July, will reconvene Nov. 7.

MARY ALICE RUSSELL

Motion hearings in another suit involving Firestone were held Wednesday. A trial date of Oct. 25 was set in Mrs. Susan F. Cochrane's suit against Firestone. Mrs. Cochrane claims that he reneged on a promise to buy some land.

Oct. 20, 1966

Firestone: Alice Spying

SEP 21

Herald Bureau

WEST PALM BEACH — A hearing has been set for Oct. 20 for Mrs. Mary Alice Firestone to show why she and her attorney should not be judged in contempt of court, as demanded in a petition filed by her husband, Russell D. Firestone Jr.

The petition, filed Tuesday in Circuit Court, claims that Mrs. Firestone violated a court order of Jan. 26, 1966. The order commanded both parties in the divorce suit not to annoy or harass the other. It included a ban against surveillance by private detectives.

Firestone's petition says that Mrs. Firestone, in testimony before a Miami justice of the peace Sept. 2, admitted observing Mrs. Myrna Odell.

Mrs. Firestone's attorney asked the court Tuesday to issue subpenas to five persons, including Mrs. Odell, to take their depositions in the case.

Sept 21, 1966.

Mrs. Firestone Asks Subpenas

WEST PALM BEACH — Attorneys for Mrs. Mary Alice Firestone filed requests in Circuit Court here to subpena six witnesses to give depositions in her suit against Russell Firestone for separate maintenance.

One of the witnesses, Mooney Futch, 975 Arthur Godfrey Rd., Miami Beach was asked to bring with him "any ease agreement between the owners of 2525 Sunset Dr., Sunset Island No. 2, Miami Beach, and Mr. and Mrs. Russell Hall and-or Russell Firestone.

The Sunset Dr. address is where Mrs. Myrna Odell was served warrants Wednesday charging her with fornication, adultery and lascivious behavior and is the address where the warrants allege the incidents took place.

Others summoned to give depositions next Wednesday were David Krishkorn. Chowere David Krishkorn, Thomasaine Frishkorn, Constable Howard Broudy and Constable John Tomaino, all of Miami Beach: and Sally McClung, of Miami.

AUG 26 1966

Exhibit to Bueno Affidavit 47

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Sept 3, 1966

Beach Divorcee Freed Of Firestone Charges

SEP 3 - 1966

By FRED BRUNING
Herald Staff Writer

Justice of the Peace Jason Berkman looked over his glasses at pretty Miss Myrna Odell Friday and said he hadn't heard enough to believe the Miami Beach divorcee had carried on a torrid, not to say illegal, love affair.

Miss Odell, dressed in a white suit and little white heels, was accused by Mrs. Russell A. Firestone of fornication, adultery and lewd and lascivious behavior.

The long - ago - separated wife of the tire heir claimed that Miss Odell and Firestone lived together at Miss Odell's home at 2525 Sunset Dr., Sunset Island No. 2, several times since June 15.

In the preliminary hearing, Justice of the Peace Berkman had to decide if there was enough evidence to bind Miss Odell over to Criminal Court.

After Berkman heard an hour and a half of testimony, an attorney for Miss Odell asked that charges be dismissed due to lack of evidence.

Berkman heard from Joseph Farish, Mrs. Firestone's lawyer, and then said: "I am not about to bind over this lady (Miss Odell) to Criminal Court on the evidence I've heard. I dismiss all charges."

While well-tanned Mrs. Firestone listened, Berkman added: "This case belongs in Circuit Court in Palm Beach and that's where it's going to stay."

Mrs. Firestone, the former Mary Alice Turner of Miami, now lives with her three-year-old son at 236 Pendleton Ave., Palm Beach, the estate she once shared with her husband.

There is a divorce suit pending between the Firestones. The next hearing has been set for Nov. 7 in Palm Beach.

Neither woman would comment after Berkman's ruling and both were whisked out of the judge's office by their attorneys.

Earlier in the day while she waited to be called to the witness stand, 30-year-old Mrs. Firestone crossed her legs, smiled for photographers and hissed that her husband has been living with a "host of women" since October, 1964, "when he walked out on me."

Firestone did not make an appearance at the preliminary hearing.

She married Firestone Aug. 1, 1961 leaving her life as a Palm Beach schoolteacher to become the tire heir's third wife.

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Exhibit to Bueno Affidavit

Florida News

Favoring Branch Banks

OCT 21 1966

Mrs. Firestone
... target of action

Judge Knott took the motion under advisement. He said he would have to study the legal points of evidence and proof brought up at the hearing Thursday.

He warned the Firestones that if the actions alleged in the contempt charge actually did occur, he would consider this to be contempt.

"I don't propose to have my order violated with impunity, and if I find that it was I'm not going to overlook it," Judge Knott emphasized.

Attorney Farish argued that the contempt motion lacked sufficient evidence. He cited a case in which affidavits of persons having personal knowledge of the contempt were required as evidence. He said that Firestone's affidavit and the transcript of Justice of the Peace court proceedings did not constitute personal knowledge.

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Firestone Case Contempt Asked

WEST PALM BEACH — Judge James R. Knott, who said he will rule later on a contempt of court motion against Mrs. Mary Alice Firestone, warned both Firestones Thursday against spying on each other.

Attorneys for Russell H. Firestone Jr. had filed the contempt charge. It alleges that through testimony before a Miami justice of the peace, Mrs. Firestone admitted that she and her attorney, Joseph Farish Jr., had been keeping Firestone under surveillance last September. A court order last January forbade such activities.

Warrants

By BILL AMLONG
and A. T. PATRUS
Herald Staff Writers

A Miami socialite divorcee was served Wednesday with three warrants — signed by the heir Russell A. Firestone's divorce-seeking wife — charging fornication, adultery and lewd and lascivious behavior.

The warrants did not name the man with whom the acts allegedly took place, but merely referred to him as "John Doe."

Deputy constables served the three warrants on Mrs. Myrna Odell at 12:57 a.m. Wednesday as she drove into the driveway of 2525 Sunset Dr., Sunset Island No. 2 — where the warrants say the incidents happened "on June 15 and for some time after."

With her in the car was a man who constables said identified himself as Russell A. Firestone, authorities said.

Mrs. Odell was formerly a fashion and society columnist for both The Miami News and The Palm Beach Post Times. For a while she worked as social director of Kings Bay Yacht Club.

Constables said both she and her companion accepted the warrants calmly and Mrs. Odell promised to appear in court Sept. 10. She was released on her own recognizance.

Neither Mrs. Odell nor Firestone could be reached for comment Wednesday.

The warrants were sworn out Tuesday before Peace Justice Jason Berkman. Accompanying Mrs. Mary Alice Firestone was her attorney, Joe Farish Jr.

Farish had nothing to say about the warrants Tuesday. "I don't know any of the details about it at all," he said.

Mrs. Firestone, nicknamed "Silky," is the former Palm Beach schoolteacher who became Firestone's third wife Aug. 1, 1961. She filed a divorce suit against the polo-playing heir in Palm Beach Circuit Court. Firestone then filed a counter suit. The trial was recessed in July until November.

"Silky's" comment about the whole thing Tuesday was simply:

"Ha, ha, ha. I have no comment. My lawyer told me I'm not supposed to say anything."

July 14, 1966

Palm Beach Masseur Testifies

Firestone Divorce Heard in Private

By WENDY ROGERS
Boca Raton Bureau Chief

WEST PALM BEACH — More presumably lurid testimony was presented behind closed doors for the second day Wednesday in the divorce trial of rubber fortune heir Russell A. Firestone Jr. and his estranged third wife Mary Alice.

Circuit Judge James R. Knott Tuesday cleared the courtroom for what he said was the sake of three-year-old Mark Allen Firestone, son of the couple. Counsels for the Firestones agreed to the move.

But before the public was barred from hearing the statements by John Timmons, an area masseur who reportedly serves customers at their homes, the mystery man she claimed shadowed her was identified.

Attorney Joseph Farish Jr., representing Mrs. Firestone, had charged in court Tuesday that a mysterious, six-foot, 210-pound man had "followed" them on the opening day of the trial.

Farish burst in after a Wednesday morning recess claiming the man was in the corridor, and that when confronted he refused to identify himself.

Judge Knott then invited the man into court.

The tall, husky, dark-haired man, wearing a blue suit and a loud print tie strode into court and identified himself as Royal Smith.

Later it was learned that the man was a prospective juror in a Criminal Court hearing who just happened to be on the fourth floor of the county courthouse where the Firestone trial is being held.

Judge Knott had asked Smith if he had been shadowing Mrs. Firestone and her attorney.

"Nope," was his reply.

"Well," said the Judge, "I won't assume you have been since you say you have not. We won't condemn you at this time for something you may not have done."

Most open testimony Wednesday focused on Everett Nowlen, a certified public accountant retained by Firestone. Defense attorneys tried to show how comparatively broke Firestone is, while Mrs. Firestone's attorney tried to show alteration of the Firestone fortune since the couple separated to make it less vulnerable.

During the testimony, the name of Mrs. Myrna Odell came up when Farish asked Nowlen if he was aware that Firestone had leased a car for her use, in addition to the Bentley and the Lincoln he owns. Nowlen said he was not aware of it. Mrs. Odell, whose name has been linked with Firestone's, is a former society writer for a local newspaper.

The barring of the public Wednesday marked the third such occasion in the three-day-old trial that is supposed to last a week.

Tuesday, the doors were closed for the reading of two depositions taken from Lorin Lamb, identified as a former jewelry salesman on Worth Ave. in Palm Beach, and John Buster, of the Bahamas.

Mrs. Firestone wants permanent custody of Mark Allen and $8,700 a month separate maintenance and child support. Firestone, whose case is now being presented to the court, counter-sued for divorce on grounds of cruelty and adultery.

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Exhibit to Bueno Affidavit

50 *Exhibit to Bueno Affidavit*

Mrs. Firestone Hits Inconsistency Of Closed Court Policy in Divorce

By WENDY ROGERS
Herald Staff Writer

WEST PALM BEACH — Mary Alice Firestone expressed dismay Thursday at the shroud of secrecy hiding "scandalous" testimony involving Russell A. Firestone Jr. in the couple's divorce battle, while she had to answer questions about alleged sexual misbehavior in open court.

"That's just fine," she said during an afternoon break in the four-day-old trial. "They left court open when I was testifying, but not when he's up there," said the dark-eyed, demure ex-school teacher.

Bailiff Joseph Tudnick guarded the courtroom door most of Thursday as the public was again barred from hearing Firestone and four other witnesses called to testify against Mrs. Firestone.

For a brief period in the afternoon, the press only was admitted as Firestone was being cross-examined by Attorney Joseph Farish Jr.

That was long enough just to hear Firestone answer a number of questions about his relationship with his former secretary, Mrs. Joyce Jane Sims.

Admitting theirs was "not altogether" a business relationship, Firestone said it included "some social" relations, for example dining out.

He denied taking trips or ever living with her as Farish fired off specific questions. He visited her after normal working hours only "to get papers or messages," he said, and never gave her gifts.

Firestone was asked if he recalled an occasion on which his estranged wife and her brother had discovered him and his former secretary in non-business fashion at his Harvey Bldg. office.

Firestone asked was that the time the two "came with a private detective and broke in."

Then the press was booted out again because of the "nature of the testimony."

Firestone is to continue on the stand today, the last day scheduled for the case in which Mrs. Firestone wants separate maintenance and child support and Russell wants divorce. Both are seeking custody of their three-year-old son.

While it is obvious that the case cannot be concluded today, it appears that, at best, the trial cannot be continued because of the heavy docket until sometime after mid-September. The first full week of open court listed on the calendar is the week of Oct. 31.

Four times Thursday Mrs. Firestone was given the name of a man and asked if she had intimate relations with him. She denied all with an emphatic "never."

Since opening day, defense for Firestone has been hammering — through direct questions to Mrs. Firestone, witnesses and depositions — alleged misbehavior by her at the Thunderbird Motel in Jacksonville on July 13, 1964.

"Isn't that ridiculous?" she stormed about an allegation that she was "running around with a sheet on."

Trim Mrs. Firestone then stood, picked up her red alligator purse, and disappeared into the courtroom.

July 15, 1966

'Scandalous' Paper Bars Public

Doors Shut in Firestone Suit

By WENDY ROGERS
Herald Staff Writer

WEST PALM BEACH — Judge James R. Knott clamped the lid on Tuesday — just as the Firestone divorce trial pot appeared ready to boil over.

Much to the disappointment of a full house of mostly elderly women, Knott barred the press and public from the courtroom at 3:25 p.m. before reading the "scandalous" deposition from Lorin Lamb, previously identified as a Worth Ave. jewelry salesman.

Mary Alice Firestone's attorney, Joseph A. Farish, Jr., requested that Lamb's deposition be read to an empty courtroom. Her husband Russell's attorney, Robert Floyd, agreed. He had asked at the beginning that public and press be barred from the entire trial.

Knott ruled that "since counsels seem to agree that the deposition is too scandalous to be made public," the courtroom should be closed.

Lamb's deposition was taken by Firestone's attorney and was introduced into evidence against her. Firestone had charged her with adultery and cruelty. She is seeking separate maintenance, support and custody of the three-year-old son, Mark Alle .

Th agreement between Farish and Firestone's lawyers came after they had shattered the tedium of a monotonous morning session of family finance by charges and denials of interference with each other's clients.

Farish charged that Monday he and Mrs. Firestone had been shadowed by a six-foot, 210-pound mystery man in his mid-forties. He also claimed someone had called his office and asked for trial information pretending to be Farish.

Floyd charged Farish "with trying to incite the sympathy of this court."

"This is a bunch of worthless allegations," he said.

Farish also charged that he had seen Firestone attorney Frederick Prior talking to one of his witnesses, Mrs. Joyce Jane Sims, former Firestone secretary, in violation of Knott's order. Prior, in turn, claimed he had only admonished Mrs. Firestone's brother, Charles Turner, whom he saw talking to Mrs. Sims, not to talk to her.

July 13, 1966

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Exhibit to Bueno Affidavit

Firestone Suit Heard In Private

Judge Considers Child's Welfare

By WENDY ROGERS
Herald Staff Writer

WEST PALM BEACH — For the sake of three-year-old Mark Allen Firestone, the public was barred Tuesday as "scandalous" material was brought before the court in the divorce battle between rubber fortune heir Russell A. Firestone Jr. and his wife, Mary Alice.

JUL 13 1966

Circuit Court Judge James R. Knott emphasized his concern is "for the future welfare of the child" as he cleared the courtroom "since counsels seem to agree that the deposition is too scandalous to be made public."

Murmuring, the crowd of mostly elderly women exited at 3:25 p.m. before the reading of a deposition from Lorin Lamb, identified earlier as a Worth Ave. jewelry salesman.

Joseph Farish Jr., attorney for Mrs. Firestone, initially requested the deposition be presented privately. Robert Floyd, attorney for Firestone, agreed, renewing his motion at the beginning that the entire trial be closed.

Another "scandalous" deposition from a John Buster, also taken as evidence against Mrs. Firestone, was admitted then, pending further consideration by Judge Knott of a motion to strike it. The doors were again closed.

That motion to strike arose, however, because the alleged misconduct detailed in the second deposition supposedly occurred while Mrs. Firestone was for a time considered legally incompetent by the court.

At day's end, Mrs. Firestone, a 30-year-old former school teacher, said she felt tired and "kind of numb." Just after the last afternoon recess, there was a brief conversation between Mrs. Firestone and her estranged husband.

She is suing for $8,700 a month separate maintenance and child support, and permanent custody of Mark Allen, her first and the third child of the 38-year-old heir.

He has been married twice before, and is counter-suing in this case for divorce on the grounds of cruelty and adultery.

July 13, 1966

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Exhibit to Bueno Affidavit

JUL 18 1966

July 14, 1966

"I bet you see a lot of tragedy go past here."

The big white-haired man who operates the elevator in the county courthouse in West Palm Beach nodded his head.

"Sure I see a lot of sad things go by, a lot of bad.

"But I see just as many happy ones. Don't forget that's the same floor they go to for their marriage licenses."

For two of the five days when the scandal-ridden Firestone divorce trial occupied the center ring on the fourth floor of the courthouse — before it was recessed until next November — the courtroom used had an incongruous sign just beside its entrance.

"Marriage Licenses" shouted the pasteboard sign. And though the arrow pointed the opposite direction to the offices next door, the sign was the last thing you noticed as you entered the courtroom.

Someone else thought it humorous that when the trial was moved to the opposite end of the hall, a bankruptcy case moved into the vacated courtroom.

While attorneys for Russell A. Firestone Jr. have tried to show that he is a poor rich boy instead of a rich rich boy, attorneys for Mrs. Firestone — Mary Alice — have tried to show that she should be supported in the lavish style to which she was accustomed while they were married.

In round figures, "Silky" — as the columnists have named her — wants $8,700 a month in separate maintenance and child support.

Among other things, while she was trying to illustrate her previous exalted standard of living, Mrs. Firestone noted she spent about $100,000 a year on clothes, "not counting furs."

A delightful acquaintance who is a nun was teasingly asked if she could imagine spending that much a year on clothes. "My goodness!" she exclaimed. "I've been wearing the same habit for several years." She added with a chuckle that the style of her religious clothing hasn't changed in many, many years.

★ ★ ★

Plenty of Gold

AS TIME dragged on in court, with the doors slammed shut almost every time details of alleged indiscretions by both partners in the unhappy marriage were presented, Mary Alice kept track of it with the smallest watch in the world that is made for women, a gold bracelet worth $5,000.

She always carried an alligator or lizard bag — red, white, pink and other colors — none of them worth under $200. In the bags were even more of those costly trinkets so dear to the female of the species — gold compact, gold lipstick case, gold billfold and money clip, gold match container, all worth about $3,500.

Pretty heady stuff.

★ ★ ★

Reconciliation?

RUSSELL JR., grandson of the founder of the vast tire empire, rode out the court storm last week without a ripple of antagonism ever showing.

His full-cheeked face, framed with brown, curly though close-cut hair, was usually impassive. Though business-like in manner, he smiled frequently.

At one time during a trial recess, he and his estranged wife brought a hush and stares in the corridor as they stood talking closely together. "Gee, do you suppose there's any hope of a reconciliation?" murmured an elderly lady onlooker who had been following closely the public lives of the flashy couple.

It doesn't look like it.

★ ★ ★

Child Waiting

WHATEVER conclusion comes out of this mess — whether it is divorce or separation, whatever the dollar and cents settlement is — it is to be hoped that the small human football, the child of these parents, will not suffer too greatly.

For now, three-year-old Mark Allen just waits patiently each night for the bedtime story he is used to.

BEST COPY AVAILABLE

Divorce Suit Teary

Witness Balks, But Testifies

By WENDY ROGERS
Herald Staff Writer

WEST PALM BEACH — An afternoon of corridor and powder room intrigue directed at a faltering witness climaxed the divorce battle Friday between Mary Alice Firestone and her rubber fortune heir husband, Russell.

MR. & MRS. FIRESTONE

First witness, Mrs. Joyce Jane Simms who was formerly Firestone's secretary, was apparently convinced by a tearful Mrs. Firestone to spend 20 minutes in closed court as a witness for her.

At day's end, the case was recessed until Nov. 7.

The courtroom has been closed to public and newsmen for most of the testimony. Mrs. Firestone, sultry 29-year-old former Palm Beach school teacher, is suing her husband for separate maintenance and child support of three-year-old Mark Allen.

Firestone, grandson of the founder of the vast tire empire, is counter-suing his third wife for divorce on grounds of adultery and cruelty.

All but one of the curious spectators — who at first had crowded the courtroom benches — had deserted the fourth floor corridor of the County Courthouse Friday after despairing of ever gaining entry.

They missed seeing a teary-eyed Mrs. Firestone burst from the courtroom and disappear into the powder room. Moments later she emerged and sought out Mrs. Simms.

Mrs. Simms, who had appeared in the corridor just before the noon recess while Firestone was on the stand, had grown more and more nervous as the hours passed.

"I hate all of this," she had said earlier, "I hate being mixed up with it. Neither one of them know what I'm going to say. When I do they could both blow up."

When it appeared that increasingly-distraught Mrs. Simms might not wish to testify, the corridor atmosphere became electrified. She and a grim Mrs. Firestone stood close together in mid-corridor for more than 10 minutes, talking in hushed but urgent tones.

"I am concerned about my own position in the situation," Mrs. Simms had said earlier.

Noticing all eyes upon them, the pair retired quickly to the powder room. As they emerged, Mrs. Firestone murmured, "I know you're scared."

They got to the door of the courtroom, then returned to the powder room. During part of the discussion, Mrs. Sherrie Brooker, an attractive red-haired witness who has not yet appeared in court, joined them.

Not long after, Mrs. Firestone was summoned. She appeared, dry-eyed, side by side with a calmed Mrs. Simms.

When finally called into the courtroom, Mrs. Simms was on the stand only about 20 minutes. "I told you it wouldn't take long," she said. "It was enough."

Later, Mrs. Firestone reemerged minutes before the trial adjourned, muttering that the testimony was "dull" for the moment.

Like three schoolgirls, the women — two of them divorced, and other engaged in a divorce battle — chatted easily in the corridor.

Other witnesses appearing in court Friday included Mrs. Ruth Singer, of the Singer Apartments where Joyce Simms formerly lived, and Mr. and Mrs. Charles Goppert.

Everett Nowlen, Firestone's accountant appeared to swear to Firestone' residency in the state.

Theodore Reed, a local television newsman, was also called briefly.

DEC 16 1965

Heir's Wife Seeks Competency Ruling

By JERRY PARKER
Herald Staff Writer

Mary Alice Firestone, the estranged wife of rubber tire heir Russell A. Firestone Jr., said Wednesday she will go before a Palm Beach County judge today to ask him to declare her mentally competent.

MARY ALICE

Mrs. Firestone, a 29-year-old dark-haired beauty, was adjudged incompetent more than a year ago, shortly after she filed suit for separate maintenance from Firestone. They were married in 1961.

Since then, she has been in the custody of her brother, Charles Turner, as guardian of her person, and the Bank of Palm Beach and Trust Co., her financial guardian.

Mrs. Firestone said she has favorable reports from two psychiatrists to present to County Judge Paul Douglas, the same judge who declared her incompetent Nov. 2, 1964.

"I don't think there will be any difficulty," Mrs. Firestone said.

Mrs. Firestone, whose friends call her "Silky," said she wants most to regain custody of her son, Mark Allen, two. The boy has been with his father since the couple separated.

Lawsuits filed in Mrs. Firestone's behalf by her guardians said that Firestone took the boy from the family's Palm Beach home in October 1964 and since then has allowed her to visit the boy for only two hours a day and in the presence of an armed guard.

The lawsuits asked $5,000 monthly support for Mrs. Firestone, who was a West Palm Beach teacher before her marriage.

Mrs. Firestone's suits said she had been under the care of a neurosurgeon since she sustained severe head and brain injuries in a 1964 automobile accident and that she had twice attempted suicide.

Exhibit to Bueno Affidavit 53

Dec 16, 1965

Mrs. Firestone

Heir's Wife Seeks Competence Ruling

DEC 16 1965

By JERRY PARKER
Herald Staff Writer

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LAUGH IT OFF

"Oh, I never make a decision without George's reluctant OK."

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December 9, 1957

Roommate Tells the Lowdown:

Don't Buzz Her Highness! Phone's Under the Pillow

By JOY REESE SHAW
Herald Staff Writer

The news may come as a blow, girls, but Marcia Valibus looks pretty even in curlers.

And worse yet . . . luscious minus lipstick.

Her highness' roommate, Mary Alice Sullivan, grudgingly admits it.

"I wish I could say she didn't," moaned Mary Alice. "But I have to be honest. I look over at her in the morning . . . and she looks like an adorable, sweet-faced child."

But there's a bright-side for plainer Janes. The Orange Bowl queen has problem finger-nails, takes quarts of pills, and never can remember which knob ignites which stove burner.

"It's maddening," laughed Mary Alice.

Actually there is little about Marcia that really maddens her royal roommate. The two are best friends, close companions and each is the other's greatest admirer.

Mary Alice, who comes complete with double dimples, is pretty much a queen herself and has held a brace of titles in her own right. The Palm Beach lovely was homecoming queen in high school . . . and a princess in Queen Marcia's University of Miami homecoming court.

The girls live with two others in a two bedroom suite in a University dormitory, sharing KP duty.

Blonde Marcia is studying radio and television, Brunette Mary Alice interning at Coral Gables Elementary School in the final phase of her teaching preparation.

The pair have their own system of signals and never upstage each other with the guys.

With all four suitemates active in campus affairs, 1245 Walsh "C" is a busy spot. It's been busier since Nov. 16 when Marcia won the coveted Orange Bowl queen title.

In addition to her studying and modeling, Marcia is in greater demand for interviews, luncheons, conferences.

Then there are the fellows . . . those just passing through town who have seen her picture—or guys on campus wanting Mary Alice to put in a good word.

"Sometimes we just stuff the telephone under a pillow," said

The two hate coffee, drink gallons of milk, hit the sack at 9:30 p.m. most week-days and arise at 6:45 a.m.

Between them, the girls whip up a good meal and often have Marcia's mother and younger sister, Dana, 17, in for an evening from Miami Beach.

They use dime store dishes and paper napkins—but insist on dining by candlelight nightly.

Saturday morning's breakfast menu: sausage, peas, steak, scrambled eggs, toast, orange juice and milk.

And on this kind of a diet, Marcia weighs a slim 120 pounds in all the right places.

The diet wears well on Mary Alice, too.

Come to think about it, she probably looks good herself in curlers and minus lipstick.

It's a downright discouraging story.

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Firestone's Bride Today Is Palm Beach Teacher

NEW YORK —(AP)— Russell A. Firestone Jr., grandson of the founder of the Firestone Tire and Rubber Co., will take a 25-year-old schoolteacher as his bride today.

The bride-to-be is Mary Alice Sullivan, 25, of Palm Beach, Fla., who taught fifth grade in a West Palm Beach elementary school until last month. It is her first marriage, and Firestone's third.

Firestone, 35, produces oil in Dallas. He also breeds race horses and polo ponies. His grandfather was the late Harvey Firestone, who founded the tire and rubber company bearing the family name.

The couple obtained a marriage license Monday. Firestone said he had been divorced in Dallas June 20 from Linda Langley, his second wife, and that an earlier marriage, to Jean L. Morrison, ended in divorce in October 1952.

Aug 1, 1961

Firestone Heir Weds Miamian

NEW YORK — (UPI) — Russell Firestone, 35, an heir to the Firestone Tire and Rubber fortune, was married Tuesday at Riverside Church to Mary Alice Turner, 25, a West Palm Beach school teacher.

It was the third marriage for Firestone, grandson of industrialist Harvey S. Firestone, and the first for Miss Turner, a native of Miami. Firestone was divorced from the former Jean Morrison of Akron, Ohio, in 1953 and from the former Linda Langley of Dallas, Tex., last June 20.

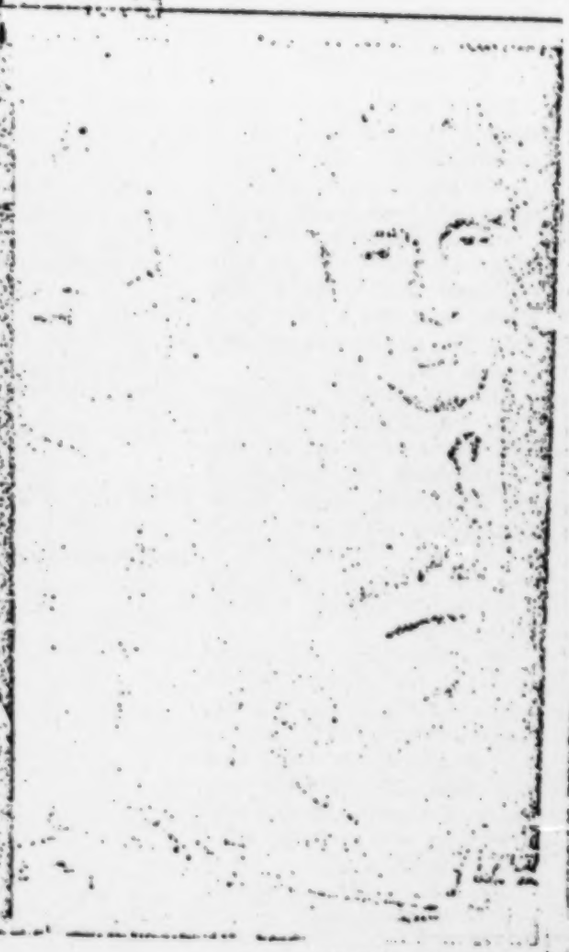
The brunette Mrs. Firestone was attended by Mrs. Robert Ludwig of New York, a former classmate at the University of Miami. Following a reception at a midtown restaurant, the couple left for a six month honeymoon in the Caribbean, Hawaii and Europe.

AUG. 2, 1961

July 3, 1963

Aug 2 1964

HER to a fortune, Russell A. Firestone Jr. embraces his bride, Mary Alice Sullivan, a 25-year-old West Palm Beach schoolteacher, shortly after their wedding Tuesday in New York. It was the third marriage for the grandson of the founder of the Firestone Tire and Rubber Co. The new Mrs. Firestone, wearing her 27-carat diamond ring, had not been married previously.
—Associated Press Wirephoto



—Associated Press Wirephoto

...ERE — OF a $250,000 ring and other valuables Mrs. ...ell Firestone, 26, of Palm Beach, looks at pictures ...ossible suspects at Chicago police headquarters. ...h her is her brother, Charles Turner. Mrs. Fire... said she was held up by two men. Also stolen ...des the 26½-karat diamond ring were $18 in cash ...a ha... ...g containing $5,760 worth of other jewelry.

July 1, 1964

1-1

Firestones Won't Stay L...

By SUZY KNICKERBOCKER
Herald Columnist

NEW YORK — The Russell Firestoneys are at it again. They just don't care. She's the former "Silky" Sullivan. I'll say.

It's nice to know that when that very social Long Island couple's divorce is final (she's going to Reno early in July) neither one will be lonely for long. She's got her next all picked out, and so does he.

Of course the gentleman and lady they've picked out are both still married to other people, but since when did that make any difference in these fast times, I prithee?

Love is everywhere on Long Island. Leslie Ripley Schwab of Locust Valley is wearing a dome-shaped diamond and ruby ring through the courtesy of widowed William Diering of Cold...

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56 Exhibit to Bueno Affidavit

Firestone's Wife Seeks Separation

our file PB

Herald Bureau

PALM BEACH — Mary Alice Firestone filed suit in circuit Court Friday asking separation from her husband, tire heir Russell A. Firestone.

Mrs. Firestone is asking for $5,000 a week to support herself and the couple's son, Mark, who was born July 1, 1963. The couple was married Aug. 1, 1961 in New York.

The suit claims that Firestone has deserted his wife, that he harassed her in public, ridiculed her because of her deformed hand, disregarded her after she had a serious accident last February which nearly took her life, and has paid no attention to their son.

Mrs. Firestone also claims that detectives hired by her husband have broken into her home and snapped pictures of her while she was home with her child and a female baby sitter. The suit charges that detectives once stole the child and hid it from her.

Mrs. Firestone is asking separate residence at 737 Island Rd. She is not suing for divorce.

Nov. 14, 1964

Feb. 7, 1964

Firestone's Wife Hurt In Wreck

PALM BEACH — The wife of millionaire sportsman Russell A. Firestone was recovering today from head injuries she received when her sports-car hit a bridge culvert.

Firestone called his wife's injury a "slight skull fracture," and said he expected her to be released from Good Samaritan Hospital "within the next two or three days."

Mrs. Firestone's 1961 Ferrari went out of control on Belvedere Rd., west of West Palm Beach, late Wednesday.

She was a passenger in her sleek car, driven by Michael G. McLain, 20, of 4168 Bougainvillea Rd.

McLain, who was not hospitalized, told sheriff's deputies he is a plasterer. They charged him with driving without a valid driver's license.

Tire Heir's Wife Asks $5

WEST PALM BEACH — Guardians for Mrs. Russell A. Firestone Monday asked Circuit Court to require her estranged husband to pay her legal fees and a $5,000 monthly allowance.

Mrs. Firestone, the former Mary Alice Sullivan, also asked the court to intervene and allow her more liberal visiting times with the couple's 18-month-old son.

The legal papers, filed in Mrs. Firestone's behalf by the Palm Beach Bank and Trust Co., trustees of her property, allege her wealthy husband deserted their home Oct. 29 and has provided only $3,000 for her support since then.

The suit also claims that on Nov. 12, Firestone, or his agents, entered their home on Island Dr. in Palm Beach, and removed their son from his bed.

Since then, the motion claimed, Firestone has "prescribed limited visitation hours, between 2 and 4 p.m. in the presence of an armed guard."

RE-UP HOLS

Dec. 8, 1964

Heir's Wife Again Seeks Separation

our file PB

WEST PALM BEACH — Mary Alice Firestone — this time acting through her legal guardian, filed suit again Monday asking separation from her husband, Russell Firestone, heir to the tire fortune.

Mrs. Firestone's first suit, filed Nov. 13, was dismissed Nov. 16 in Circuit Court on the grounds that she had been declared mentally incompetent.

The new suit was filed on Mrs. Firestone's behalf by the Bank of Palm Beach and Trust Co., which assumed property responsibility for Mrs. Firestone Nov. 17. Bank vice president Paul Schmidt signed the complaint.

The suit asks separate maintenance and $5,000 a month support for Mrs. Firestone and the couple's 16-month-old son.

Mrs. Firestone, 28, is the former Mary Alice Sullivan, a former school teacher, married to Firestone in 1961.

Nov. 24, 1964

Firestone Court Suit Dismissed

our file PB

Herald Bureau

PALM BEACH — Mrs. Russell A. Firestone's suit for separate maintenance was dismissed from Circuit Court Monday.

The dismissal was granted on motion of Mrs. Firestone's estranged husband, heir to the rubber tire fortune, who claimed his wife had been adjudged mentally incompetent.

Firestone furnished a copy of an order signed Nov. 2 by County Judge Paul T. Douglas which declared Mrs. Firestone mentally incompetent with suicidal tendencies.

Mrs. Firestone filed Friday for separate maintenance and $5,000 a week support for herself and the couple's 16-month-old son.

Mrs. Firestone, 28 is the former May Alice Sullivan. She was a Palm Beach school teacher when she married Firestone in 1961.

Nov. 17, 1964

Jan. 5, 1965

Mrs. Firestone Files Separation Suit Again

our file PB

Herald Bureau

WEST PALM BEACH — Mrs. Mary Alice Firestone re-filed her suit for separation from tire heir Russell Firestone in Circuit Court Monday.

A similar suit was dismissed last week, but Mrs. Firestone is now asking a hearing during which her husband would be asked specific questions concerning the marriage. The hearing is tentatively set for Jan. 26 at 11:30 a.m.

Mrs. Firestone, a former school teacher, is asking custody of the couple's 14-month-old son, a separate home from her husband, and temporary alimony.

The Firestones were married in 1961.

DEC 17 1965

Mrs. Firestone Ruled Competent

By JOHN VAN GIESON
Herald Staff Writer

WEST PALM BEACH — County Judge Paul Douglas ruled Thursday that Mary Alice Firestone, wife of tire fortune heir Russell A. Firestone, is legally competent.

The same judge declared her legally incompetent on Nov. 2, 1964. Mrs. Firestone will use her regained competency to pursue her separate maintenance suit against her husband.

Attorney Joseph A. Farish Jr., who represented Mrs. Firestone in the hearing before Judge Douglas, said he will seek $5,000 monthly allowance and custody of the couple's two-year-old son, Mark Allen, for Mrs. Firestone, 29, who used to teach school in West Palm Beach.

Mrs. Firestone first filed a separate maintenance suit against her husband on Nov. 13, 1964, but it was dismissed three days later in Circuit Court. Firestone countered with a suit for divorce.

A second separate maintenance suit was filed on behalf of Mrs. Firetone on Nov. 23, 1964 by Bank of Palm Beach and Trust Co. Vice President Paul Schmidt. The bank at the time was financially responsible for her.

That suit charged that Firestone took Mark Allen and limited Mrs. Firestone's visits with the boy to two hours a day in the presence of an armed guard.

Mrs. Firestone
... renews suit

Mrs. Firestone
DEC 17 1965

Ruled Competent By County Judge

our file #13

By JOHN VAN GIESON
Herald Staff Writer

WEST PALM BEACH — County Judge Paul Douglas ruled Thursday that Mary Alice Firestone, wife of the tire fortune heir Russell A. Firestone, is legally competent.

The same judge declared her legally incompetent on Nov. 2, 1964. Mrs. Firestone will use her regained competency, to pursue her separate maintenance suit against her husband.

Attorney Joseph A. Farish Jr., who represented Mrs. Firestone in the hearing before Judge Douglas, said he and flamboyant Attorney Melvin Belli will meet here between Christmas and New Year's to discuss the suit.

Belli is the controversial San Francisco lawyer whose famous clients include Jack Ruby, the killer of accused assassin Lee Harvey Oswald. Belli also defended the pasties-wearing waitresses in a Dania night club.

Farish and Belli will seek and custody of the couple's two-year-old son, Mark Allen, for Mrs. Firestone, a 29-year-old black-haired beauty who used to teach school in West Palm Beach.

Mrs. Firestone first filed a separate maintenance suit against her husband on Nov. 13, 1964, but it was dismissed three days later in Circuit Court. Firestone countered with a suit for divorce.

A second separate maintenance suit was filed in behalf of Mrs. Firestone on Nov. 23, 1964 by Bank of Palm Beach and Trust Co. Vice President Paul Schmidt. The bank at the time was financially responsible for her.

That suit charged that Firestone took Mark Allen from the family's Palm Beach home in October, 1964 and limited Mrs. Firestone's visits with the boy to two hours a day in the presence of an armed guard.

Thursday's ruling makes Mrs. Firestone again responsible for herself. J. Luther Drews had assumed her financial responsibility and her brother, Charles Turner, was personally responsible.

The competency hearing was a short one. Among the evidence presented in behalf of Mrs. Firestone were the favorable reports of two psychiatrists.

Exhibit to Bueno Affidavit 57

gainst Detective

APR 16 1966

Mrs. Firestone Files Suit

our file #12

Herald Bureau

WEST PALM BEACH — Mary Alice Firestone Friday filed a $100,000 suit against a private detective in Circuit Court, charging him with invasion of privacy.

In her suit, Mrs. Firestone states that private detective Arthur J. Balletti has brought her into "public disrepute" by openly shadowing her.

She claims that between Dec. 24 and Dec. 31 Balletti unlawfully entered her home and attached a device to her telephone which has been monitoring her calls.

In January when Mrs. Firestone won a $2,000 a month temporary alimony settlement from her estranged husband, tire heir Russell Firestone Jr., Circuit Court Judge James R. Knott also ordered that neither party "annoy or harass the other" by hiring detectives wiretapping or other such tactics.

Mrs. Firestone is asking $50,000 in compensatory damages and another $50,000 for punitive damages and trial by jury.

Mrs. Firestone
... $100,000 suit

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58
Exhibit to Bueno Affidavit
APR 16 1966

Firestone Wife Sues Detective

Herald Bureau

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Judge Awards Firestone Wife $2,000 Monthly

Herald Bureau

WEST PALM BEACH — Mrs. Mary Alice Firestone's request for $8,500 a month temporary support was substantially reduced Wednesday by Circuit Court Judge James R. Knott.

Knott ordered Russell A. Firestone Jr., heir to the Firestone tire fortune, to pay $2,000 a month for temporary support and maintenance of his wife and son, Mark Allen, 3.

Alice Firestone
... request cut

In her petition for temporary support, Mrs. Firestone listed her clothing needs alone at $2,000.

Judge Knott also ordered that neither Mrs. Firestone who is suing for separate maintenance, nor her estranged husband, who has countered with a divorce suit, attempt to "annoy or harass the other."

The order specifically forbids "surveillance by private detectives and wiretapping telephones or any other such tactics."

Mrs. Firestone's attorneys, Farish and Farish, were granted $10,000 for temporary attorney's fees and $2,000 for temporary costs and expenses, both to be paid by Firestone.

The attorneys orginally asked $25,000 and $5,000, respectively.

Mrs. Firestone had itemized her needs [illegible]

food, $500; milk, $60; fish, $50; health food, $50; car lease, $250; wash and gasoline, $75.

Electricity, $75; gas, $20; telephone, $150; home repairs, $200; exterminator service, $12; gardener, $50; lawn spray, $12; window cleaning, $10; newspapers, $5; magazines and books, $60.

Beauty salon, $238; clothing, $2,000; clothing alterations, $200; dry cleaning, $80; photographs, $30; drugs, $100; masseuse and spa, $240; ballet lessons, $30; art lessons, $30; bridge lessons, $50; shoe repair, $25; florist, $100.

Catering, $100; club dues, $100; chiropractor, $40; doctors, $100; dentist, $25; church and charity donations, $100; dining out, $300; charity balls, $200; holiday presents and social gifts, $50; poodle clip and wash, $25; tennis and golf, $100; stamps and stationery, $25, and safety deposit box rental, $2.

For her son, Mrs. Firestone listed school, $25; swimming lessons, $100; clothing, $300; doctor, $25.

She also added $250 a month for miscellaneous items.

Jan. 27, 1966

SEP 19 1965

FIRESTONES DECID

It's a ... Of Sett

By Suzy Knickerbocker
Herald Columnist

NEW YORK — Mary Alice Firestone has engaged lawyer Melvin Belli, the San Francisco flash, to take her case in her divorce action against Russell Firestone, who has millions. His family has done rather well in rubber, you know.

Belli is going to Cleveland to draw a bead on Russell's estate. As I keep saying, ad infinitum, when love flies out the window the only thing left is who gets what and how much.

Russell and Mary Alice were married at New York's Riverside Church in the Summer of 1961. She was 25, he was 35 and the engagement ring was 27 carats, a glittering marquise almost as long as Mary Alice's finger. Russell played polo and had racing stables and Mary Alice attended Sullins College and graduated from the University of Virginia.

She taught grade school until she made the grade herself. They honeymooned in Bermuda, Honolulu and Europe. They've been estranged for at least a year. Now sit back and watch Belli come on strong.

Temporary Custody of Son Granted to Mrs. Firestone

ourfile P3 JAN 19 1966
Herald Bureau

WEST PALM BEACH — Mary Alice Firestone was granted temporary custody of her three-year-old son Tuesday by Circuit Court Judge James R. Knott.

An agreement giving her custody of her son, Mark Allen, was reached in Knott's chamber during a meeting between the judge, her attorney, Joe Farish Jr., and her estranged husband's attorneys, Bill Pruitt and Ted Pryor.

Mrs. Firestone was given custody of the boy until her husband Russell's divorce suit comes to trial within 60 to 90 days.

The agreement provides that the child will be attended to by a nurse acceptable to both parties, neither can take him out of the county and both must refrain from annoying or harrassing the other.

Knott also said that he would rule shortly on her motion for $8,370-a-month separate maintenance and payment by her husband of her attorney's fees.

Mr. and Mrs. Russell Firestone — ... *in happier days*

59
Exhibit to Bueno Affidavit

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA
(Title omitted in printing)

[SAME TITLE]

Affidavit of Lois Wilson

COUNTY OF DADE
STATE OF FLORIDA } ss.:

BEFORE ME, the undersigned authority, personally appeared LOIS WILSON, who, being first duly sworn and cautioned deposes and says:

1. That Affiant is the Librarian for The Palm Beach Post and Palm Beach Times which are daily newspapers published in Palm Beach County, Florida, and circulated throughout South Florida and the State of Florida.

2. That in the ordinary course of the business of said newspapers, clippings of prominent personalities and events are taken from the said newspaper and maintained in a library for reference work at future times.

3. That Affiant has searched the library clippings of said papers and has obtained therefrom the attached copies of clippings referring to Mrs. Russell Firestone, also known as Mary Alice Sullivan, prior to December 14, 1967; that the attached copies are true and correct copies and were published in said newspapers on the dates stamped on said clippings.

FURTHER AFFIANT SAITH NOT.

s/ LOIS WILSON
Lois Wilson

(Jurat omitted in printing.)

SEP 19 1965 (1)

EP 19 1965 BY MYRNA ODELL

They call her Silky Sullivan, after a race horse which not only lost, but ran last in a race several years ago. This Silky is former schoolteacher who doesn't intend to lose since her stakes are a lot higher.

Mary Alice Sullivan Firestone is her real name, and she's in the process of divorcing Russell of the

MELVIN BELLI | PRINCE OBOLENSKY | FRED HOPE | DANNY MORAN

rubber tires. Silky recently hired attorney Melvin Belli, the man who once defended the man who supposedly shot the man who supposedly shot President Kennedy.

"Mr.Belli went to Cleveland to take a deposition of my husband's trust fund," Silky giggled. "I think that's interesting - to see what's behind all those Firestone millions. Probably a dollar and a half."

Good-looking Mary Alice's brother, Charles Turner, 26, is her guardian. "You see, I'm incompetent. Legally incompetent," Mary Alice says, adding that she's been followed for two years. "It's horrible. I don't even trust the phone I'm on. Private detectives have broken into my house in the middle of the night and terrified my child, my child's nursemaid, and me."

Russell says nothing about what's happened or who's following whom, except that he's sorry his wife wants to try her case in the newspapers. "My lawyers have advised me to wait until it goes to court," he concludes.

Mary Alice says neither one of them has the child and that she goes to see him once a day and that the baby is watched by a big guard and Russell says . . . . well, I always said there must be better material for a column than the details of a divorce but after all, it is a quiet summer in Palm Beach and most people are getting their jollies talking about the Firestones.

Both of them are living in comparatively small homes in Palm Beach, only a few blocks from each other — both have been here this summer, and both say they haven't been "out" in a year or more (That's with a member of the opposite sex). Both are probably sick of it all by now.

Testimony Opens In Firestone Case

(1)

FEB 8 1967

Private investigator Donald Ehrler of West Palm Beach was the first witness to be called to the stand as the much-delayed Firestone divorce trial resumed today at 9:30 a. m. before Circuit Court Judge James R. Knott.

Ehrler was hired in 1964 by attorneys for Mrs. Mary Alice Firestone to keep a surveillance on her husband, Russell A. Firestone Jr.

Several minutes after testimony began, attorneys for Firestone asked that the press and public be excluded from hearing further testimony as they had been in earlier proceedings. Judge Knott refused the request.

The Firestones's domestic troubles began in November, 1964, when Mrs. Firestone filed a complaint for separate maintenance. The complaint was dismissed a week later by the court on the grounds that Mrs. Firestone was not mentally competent to file such action.

On July 5, 1965, the Bank of Palm Beach and Trust Co. filed another complaint for separate maintenance, acting as Mrs. Firestone's legal guardian. They also filed for custody of the Firestone's four-year-old son Mark and for $8,700 per month support for Mrs. Firestone.

Later, attorneys for Firestone filed a counter suit for divorce charging Mrs. Firestone wih cruelty and adultery.

Mrs. Firestone was found mentally competent in December, 1965.

The trial started in July, 1966, and another session was held in November.

Today's session is a continuation of the action. Another session is scheduled for March 13.

Exhibit to Wilson Affidavit 61

FEB 10 1967

Misconduct Denied In Firestone Case

(2)

Mrs. Myrna Odell, the alleged companion of Russell A. Firestone Jr., testified Thursday in the divorce-support trial of Firestone and his wife, Mary Alice, saying that she had never had a love affair with the Firestone tire fortune heir.

After categorically denying that she had been in bed with Firestone on New Year's Eve, 1965 — as sworn by two private investigators, that she had received expensive gifts from him, or that she had traveled to Panama for the abortion of a child by Firestone, Mrs. Odell was ruled an unwilling and hostile witness by Circuit Court Judge James R. Knott. The ruling was made, however, over objections by Firestone's attorney, Robert L. Floyd.

Testimony was heard from Mrs. Odell's parents, Mr. and Mrs. Peter Odell of Miami, who said, in effect, that they were friends of Firestone's, that he will have a financial interest with them in their Harbor Hill Club apartment complex in Miami and that they considered him and their daughter close friends.

Further testimony was heard from a Lake Worth doctor, members of the Palm Beach Police Department and the two investigators, Arthur J. Balletti and Clifford Arnold, who had given the testimony — though differing widely on some points — concerning the alleged New Year's Eve bedroom scene.

At the end of Thursday's testimony in the marathon trial, which has been carried over from last summer, Attorney Joseph Farish, who represents Mrs. Firestone, said that he will be unable to finish his presentation during today's session, which begins at 9:30 a.m.

The continuation of the trial after today's testimony, therefore, was set by Judge Knott for the week of March 13.

Lawyers' Charges, Counter-Charges

divorce trial ends

Mark Firestone Divorce Trial End

MAY 10 1967

By FRANK MESSERSMITH
Staff Writer

The Firestone divorce trial ended late Tuesday evening after one final round of accusations during closing arguments, of alleged "pay-offs' by attorneys to witnesses who testified for one or the other of the litigants.

The closing of arguments Tuesday before Palm Beach County Circuit Court Judge James R. Knott brought to an end, two and one half years of legal embroilment between Russell A. Firestone Jr., an heir to the Firestone rubber fortune, and his estranged wife, Mary Alice.

Judge Knott has given Joseph Farish Jr., Mrs. Firestone's attorney, 20 days in which to file a written brief concerning the doctrine of incrimination, and then it is up to him to make a decision in the long contested suit.

Attorneys representing Firestone, Robert Floyd of Frate, Fay, Floyd and Pearson, Miami, and Fisher, Prior, Pruitt and Schulle, of West Palm Beach, informed Judge Knott that they had nothing further to offer.

In the four hours of arguments and counter-arguments, it was charged that Firestone's attorneys had dredged-up several witnesses who testified favorably for Firestone and were compensated for their services.

Farish was in turn accused of making a deal with Thomas E. Murphy, a witness called by Farish, who was termed a shake-down artist by both sides.

Floyd said that Murphy testified in a deposition that he was to receive a $20,000 fee for his services after Mrs. Firestone received her court settlement.

Murphey's testimony concerned a segment of the trial which was closed to the press and the public for its alleged candalous material.

Attorneys for both sides denied the allegations of each party.

In the arguments for the divorce sought by Firestone, his attorneys said that the severance should be granted because

(Continued On Page 2, Col. 1)

(Continued from Page 1)

of adultry and misconduct on the part of Mrs. Firestone.

Floyd cited what he termed to be a total absence of domesticity in Mrs. Firestone.

He said that the Firestone marriage "went down the drain when Mrs. Firestone became involved in a scandalous incident in 1964 with a jewelry salesman in Palm Beach.

Farish, in answer, said that with respect to the doctrine of incrimination, Firestone did not come to trial with "clean hands" and therefore is without grounds for divorce for alleged misconduct.

Farish also stated that the period of time in which Mrs. Firestone is accused of adultry and misconduct, was that time when she was declared legally incompetent by County Judge Paul T. Douglas.

Mrs. Firestone was declared mentally incompetent February 1964, following a car accident in which she suffered serious head injuries. She was ordered restored to competency Dec. 15, 1965.

A person can not be held responsible for acts committed after that person is declared incompetent, Farish said.

Floyd, in his final rebuttal, said that the doctrine of incrimination has no value in the Firestone divorce case, and, in fact, the doctrine is not strictly adhered to in many recent cases.

Floyd cited several cases for Judge Knott to read concerning the doctrine.

In his closing statement, Farish said that to grant Firestone a divorce would be doing him a great injustice. Its high time that someone told him that he's got to accept the responsibility of life, Fairish said.

Firestone can not go from wife-to-wife, leaving a string of children, Farish said. It's high time that justice prevailed and not the Firestone fortune, he concluded.

In the morning session of the arguments, Farish issued a statement concerning his fees for work in the Firestone case.

In the period from December, 1961, when he was employed, to the present, Farish said he recorded 1,065 hours of briefings, office time, conferences and witness interviews.

He also said that he had recorded some 36 statements in Palm Beach County, 23 depositions outside of the county and had eight hearings and five court sessions.

Kirk Sullivan, a local attorney, testified that based on fees paid to other successful attorneys in the county, a reasonable fee for Farish would be $130,500.

Sullivan based his estimate of the figures of $50 an hour for office time, $100 an hour while recording depositions, $500 a day for out of town work, and $500 a day for time spent in court.

Marshall Criser, an attorney called to testify by Firestone's attorneys, said that based on the number of hours and work sited by Farish, a reasonable fee would be about $13,000.

Exhibit to Wilson Affidavit 62

Firestone Trial Ends Amid Welter Of Implied Charges

MAY 10 1967

MAY 10 1967

Closing arguments, in which implied accusations were made of alleged pay-offs by attorneys for witnesses who allegedly perjured themselves on the stand to the benefit of one or the other of the litigants, brought to an end two and half years of legal embroilment of the Firestone divorce trial.

However, Palm Beach County Circuit Court Judge James R. Knott gave Joseph Farish Jr., attorney for Mary Alice Firestone, who is the estranged wife of Russell A. Firestone Jr., heir to the Firestone fortune, 20 days in which to file a written law brief concerning the Doctrine of Incrimination before Judge Knott makes a decision in the long-contested suit.

Attorneys representing Firestone informed Judge Knott that they had nothing further to offer.

Firestone was seeking the divorce on the grounds that Mrs. Firestone was allegedly guilty of adultery and misconduct.

Farish answered that with respect to the Doctrine of Incrimination, Firestone did not come to trial with "clean hands" and therefore is without grounds for divorce.

He added that during the period of time in which Mrs. Firestone is accused of adultery and misconduct, she was declared legally incompetent by County Judge Paul T. Douglas following a car accident in which she suffered serious head injuries. Farish therefore maintained that a person cannot be held responsible for acts comitted after that person is declared incompetent.

During the morning session, Farish issued a statement concerning his fees for the number of hours and work he devoted to the Firestone case. Atty. Kirk Sullivan, testified for Farish that based on his statement and the fees paid to other successful attorneys in the county, a reasonable fee for Farish would be $130,500.

Atty. Marshall Criser, called to testify by Firestone's attorneys, said that by using the same criteria, he estimated a reasonable fee for Farish would be about $43,000.

Judge Knott reserved his decision concerning the fee settlement.

Exhibit to Wilson Affidavit

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Exhibit to Wilson Affidavit

Firestone Witness Denies Misconduct

FEB 9 1967

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Mrs. Myrna Odell, the object of much testimony in the continuing Firestone divorce trial, took the witness stand today and "absolutely" denied there was any sexual promiscuity between herself and Russell A. Firestone Jr.

Asked by attorney for Firestone's estranged wife Mrs. Mary Alice Firestone, Joseph Farish Jr., if she had "ever been in bed with Firestone," normally composed Mrs. Odell answered in almost a shout, saying "I'm absolutely denying it."

Testimony earlier today from two private investigators, hired by Firestone to watch Mrs. Firestone, had placed Mrs. Odell in Firestone's bed at his former Palm Beach residence on New Year's Eve, 1965.

Following several other questions concerning the alleged New Year's Eve incident, Farish asked that Circuit Court Judge James R. Knott declare Mrs. Odell an "unwilling and hostile witness."

Judge Knott did so, over the "strenuous objections" of Firestone's counsel, Robert Floyd.

Firestone and Mrs. Odell, according to the testimony of investigators Arthur J. Valletti and Clifford Arnold Perry, were observed about 10 p.m. Dec. 31, 1965, lying in bed in the bedroom of Firestone's former Palm Beach residence, 150 Barton Ave.

Valletti, in a meeting with Firestone on the date following the observation, stated to the court that "I told him he shouldn't be there with a single woman."

The two detectives made the alleged accidental observation when they went to the Firestone home to talk with him concerning their surveillance.

Valletti also testified that he had met with Firestone earlier in the evening of Dec. 31 and had observed Mrs. Odell walking from the bedroom wearing what appeared to be a house coat. Firestone was wearing walking shorts, Valletti said.

Investigators Testify In Firestone Case

FEB 9 1967

Two Miami private investigators highlighted the testimony in this morning's session of the Firestone divorce trial, stating that they had observed Russell A. Firestone Jr., in bed New Year's Eve, 1965, with a woman companion.

The much-delayed trial was in its second day today.

The investigators, who were hired by Firestone in mid-December, 1965, to keep a surveillance on his estranged wife, Mary Alice, identified the female companion as Mrs. Myrna Odell.

The couple, according to the testimony of Arthur J. Valletti and Clifford Arnold Perry, were observed about 10 p.m. Dec. 31, 1965, lying in bed in the bedroom of Firestone's former Palm Beach residence, 150 Barton Ave.

Valletti, in a meeting with Firestone on the date following the observation, stated to the court that "I told him he shouldn't be there with a single woman."

The two detectives made the alleged accidental observation when they went to the Firestone home to talk with him concerning their surveillance.

Valletti also testified that he had met with Firestone earlier

Diminutive Blonde Denies Promiscuity With Firestone

FEB 10 1967

FEB 1 0 ..

A diminutive blonde in a tailored suit and a slim brunette in a white shift shared a circuit court chamber Thursday. The blonde denied any promiscuity with the estranged husband of the other.

The blonde was Mrs. Myrna Odell, Miami, and Palm Beach society writer.

The brunette: Mary Alice Firestone of Palm Beach.

The scene was yet another day of testimony in the divorce-support trial of Russell A. Firestone Jr. and Mary Alice Firestone. The case has been heard intermittently since last summer before Circuit Court Judge James R. Knott.

Attorney Joseph Farish Jr., representing Mrs. Firestone, stated at the close of Thursday's testimony that he will be unable to finish his presentation this week.

Thus the marathon trial is assured of still another session. The next one is docketed for the week of March 13.

Volumes of testimony thus far in the court records include allegations of misconduct leveled by Firestone's attorneys against his wife. Much of the prior testimony was heard in sessions closed to the public and press because of its allegedly "lurid" flavor.

Witnesses now being heard are those subpoenaed by Farish in behalf of his client.

Mrs. Odell, on the stand for the first time in the case on Thursday, categorically denied all testimony which had placed Firestone and herself together in a bedroom of the Firestone home in Palm Beach on New Year's Eve.

The bedroom scene had been verbally painted by two private detectives in testimony which did not quite match.

The investigators, both of Miami, were Arthur J. Balletti and Clifford Arnold Perry. The pair at one time were employed by Firestone to keep a surveillance on his wife.

They testified Thursday that they "accidentally" observed Firestone and a woman they identified as Mrs. Odell lying in bed together at Firestone's former home at 150 Barton Ave., Palm Beach.

They said the observation was made as they neared a bedroom window at [illegible] p.m. of New Year's Eve, 1965.

The investigators differed widely in their description of the clothing of Firestone's alleged woman companion on the night in question.

Mrs. Odell calmly denied misconduct with Firestone on New Year's Eve or at any other time. She said she and Firestone were, in fact, at a Palm Beach club at the time of the alleged incident and remained there until late in the early morning.

In further testimony, Mrs. Odell also denied she had been the recipient of expensive clothing and gifts purchased by Firestone as had been indicated in previous testimony from other witnesses.

"I consider him a good friend," said Mrs. Odell regarding her relationship with Firestone. She further testified she may have told the tire and rubber fortune heir that she liked him — but that she had never said she loved him.

Farish then asked that she be declared an "unwilling and hostile witness," which was so ruled by Judge Knott over the objection of Firestone's Chief Council, Robert L. Floyd.

The trial resumes at 9:30 a.m. today for what will probably be the final day until the March 13 session.

BEST COPY AVAILABLE

Court Told Firestone Boy 'Better Off' With Mother

MAR 1 4 1967

By FRANK MESSERSMITH
Staff Writer

Testimony concerning the mental and physical health of Mark Firestone, 4, son of Russell A. Firestone Jr. and his estranged wife Mary Alice, was heard in the Monday afternoon session of the long-running divorce trial.

The proceedings are scheduled to continue at 9:30 a.m. today before Circuit Court Judge James R. Knott in the second day of what is thought to be the last week of action in the trial.

A former governess of the child testified that the boy is an "entirely different child" when he is in the custody of Mrs. Firestone.

When the boy was in the custody of his father, the woman said, "I used to have a hard time keeping him in good health."

The woman, who was employed by Firestone from June 1965 to Dec., 1965, also testified that Russell Firestone had never eaten dinner with her and Mark and had never participated in any activities with his son.

Her employment by Firestone was terminated when it was discovered that she was going to testify at the trial as a witness for Mrs. Firestone, the woman said.

In her closing testimony, the woman said, "I have no hard feelings for Mr. Firestone, I just personally feel that Mark is better off with his mother.

Two other women, Mrs. Roscoe T. Anthony, of South Lake Trail, Palm Beach, and Mrs. Nancy Wakeman, of 120 El Brillo Way, Palm Beach, were the only other witnesses testifying Monday afternoon.

Mrs. Anthony said she first met Mrs. Firestone and her son when they attended a church in Palm Beach where Mrs. Anthony tended the children's nursery.

The woman said she noticed "such a change" in Mark after he was put in the custody of his mother. She was loving, gentle and understanding, Mrs. Anthony said.

"This little boy seemed to blossom under her care," she testified.

Mrs. Wakeman, who has a son who is a playmate of Mark's, said that the boy is healthy, alert, bright and happy now that he is in the custody of his mother.

Mrs. Firestone has exhibited a good deal of apparent love and affection for Mark, Mrs. Wakeman testified.

Both witnesses also testified they have never seen Mrs. Firestone conduct herself in anything other than a lady-like fashion.

Much of the afternoon session was spent reading previous testimony made by Firestone in depositions taken as far back as 1964.

Four other witnesses took the stand in the morning session to give testimony in the case.

Firestone Is Called To Stand

MAR 1 6 1967

Heir to the Firestone tire and rubber fortune, Russell A. Firestone Jr., testified in his divorce case Wednesday afternoon that he did not want reconciliation with his estranged wife, Mrs. Mary Alice Firestone, for whom he had no love or respect.

Rebuttals by Firestone's attorney are expected to be concluded in his long-running divorce case this afternoon in Palm Beach Circuit Court before Circuit Court Judge James R. Knott.

The trial could possibly end Friday, depending on the length of closing arguments.

Robert Graham, a deputy clerk of the Broward County Circuit Court, was the only other witness on the stand in rebuttals Wednesday. He testified concerning a witness who had been involved in a session of the trial which hadbeen closed to the public and press.

Investigator Says Firestone Visited Home Of Ex-Wife

FEB 9 1967

Seven witnesses were heard Wednesday in the Firestone divorce trial which has, in previous sessions, been termed "sensational."

The witnesses heard Wednesday in the divorce trial of Russell A. Firestone Jr. and his estranged wife, Mary Alice, were subpoenaed to testify by Mrs. Firestone's attorney.

Donald Ehrler, a West Palm Beach private investigator, hired by Mrs. Firestone, reported to the court, his findings concerning his surveillance of Firestone since March, 1964.

Ehrler testified that on at least five different occasions in 1964 and 1965, he has observed Firestone staying through the night at the residence of a former wife.

The private investigator was also asked to identify photographs he allegedly had taken of misconduct between Firestone and his former secretary at Firestone's office in West Palm Beach.

In cross-examination of Ehrler, one of the three Firestone attorneys present questioned Ehrler about alleged discrepancies he had found in the testimony given and what he had read in the surveillance notes used by Ehrler in his testimony.

Ehrler was excused from the stand and returned later in the day to submit his official office copy of the surveillance notes for examination by Firestone's attorneys.

David Frischkorn, a Miami acquaintance of Firestone, testified he and his wife had dined twice with Firestone and a companion, Mrs. Myrna Odell.

Frischkorn further testified that he and his wife had visited Firestone at a residence located at 2525 Sunset Drive, Sunset Isle 2, in Miami Beach. Mrs. Odell was then present, Frischkorn said.

Firestone allegedly maintained the residence under the name of R. E. Hall.

Mr. and Mrs. Frischkorn are currently involved in a contested divorce action in Miami courts.

Mrs. Odell's former brother-in-law, J. Michael Houghton, a bank officer at the Cocoanut Grove Bank in Miami, was also among the testifying witnesses Wednesday.

Houghton was questioned about a bank account listed under the name of The Harbor Hill Club apartments in which Firestone has a minor interest.

The bank's records of the Harbor Hill account and the records of a $22,000 loan received by Firestone were admitted as evidence in the trial.

Other witnesses testifying included Alfred Lee, a commercial supervisor of the Southern Bell Telephone and Telegraph Company in Miami, a supervisor from the Florida Power and Light Co. in Miami, and two deputy constables from district five in Miami.

Testimony heard from the four was relative to the residence Firestone allegedly maintained on Sunset Isle under the name of Hall.

Throughout Wednesday's session, Mrs. Firestone, who was dressed in a pink and orange striped, white polka-dotted sleeveless dress, sketched dress designs on a yellow sheet of paper.

Exhibit to Wilson Affidavit

Exhibit to Wilson Affidavit 66

Firestone Case Lawyers May End Rebuttals Today

MAR 16 1967

By FRANK MESSERSMITH
Staff Writer

Attorneys for Russell A. Firestone Jr. are expected to conclude their rebuttals in the long-running Firestone divorce case sometime this afternoon in Palm Beach County Circuit Court.

Depending on the length of closing arguments, the trial could possibly end Friday. It had been speculated as far back as early February that the trial might conclude during this week's session.

Rebuttals began after attorney for Mrs. Mary Alice Firestone rested his case before Circuit Court Judge James R. Knott shortly before the noon recess.

Attorney Robert L. Floyd put his client, Firestone, on the witness stand during rebuttals.

Among other things, Firestone testified concerning why he did not want reconciliation with his estranged wife and also why he had not visited frequently with his son Mark, 4, who is in the custody of Mrs. Firestone.

Countering a statement made by Charles Turner, Mrs. Firestone's brother, who testified Wednesday morning, Firestone said that he has no love and no more respect for his estranged wife, and he does not want any reconciliation.

Turner had testified that Firestone had said "he loved her (Mrs. Firestone) and wanted to go out with her," "He has expressed that same feeling on several occasions," Turner said. "I think that is the way he has always felt."

Firestone released a letter in February to local news media stating that he did not want reconciliation because he felt Mrs. Firestone had conducted herself in a way unbecoming a mother and wife.

The heir to the Firestone tire and rubber fortune further testified that he had not visited his son frequently because his estranged wife constantly wanted him to meet her girl friends when he would visit the home.

The only other witness on the stand in rebuttals Wednesday was Robert Graham, a deputy clerk of the Broward County Circuit Court. He testified concerning a witness who had been involved in a session of the trial which had been closed to the public and press.

Perjury Charge Pending In Trial

MAR 17 1967

County Solicitor Marvin U. Mounts was instructed Thursday to determine whether perjury charges should be filed against a former secretary to Russell A. Firestone, Jr.

Circuit Judge James R. Knott ordered an investigation after a letter allegedly written by the ex-secretary, Mrs. Joyce Simms, was introduced as evidence in the Firestone divorce case.

The letter purported to be a confession by Mrs. Simms to her second husband, from whom she is separated, that she lied when she swore earlier that she had sexual relations with Firestone.

"I lied on the deposition just to help Mrs. Firestone get her baby because I can imagine what it's like to be without your baby," the letter stated.

Mrs. Simms, a mother, was said to have written the letter to James T. Nicholson III, now a university student in Washington, D.C., who is seeking an annulment of their marriage. Mrs. Simms has assumed the name of her first husband, Charles Simms.

The letter to Nicholson contained the statements: "I only worked for Mr. Firestone. I wasn't his girl friend."

Firestone and his estranged wife, Mary Alice, are both seeking custody of their son, Mark, 4.

Taking of testimony in the sensational trial ended Thursday. Judge Knott will hear closing arguments by attorneys after they have had time to review the case, it was reported.

Economist Called In Firestone Case

MAR 14 1967

A consulting economist from Miami testified today, in the continuing Firestone divorce trial in Palm Beach County Circuit Court, that Mrs. Mary Alice Firestone would need at least 77.5 per cent of her husband's yearly net income to maintain herself and her child at the same economic level to which they are accustomed.

The economist, Mrs. Margaret Biely of Biely, Wagner & Associates, Inc. Miami and Washington, D.C., testified that, based on a maximum annual net income for Russell A. Firestone Jr., of $231,000, the amount needed by Mrs. Firestone to cover her expenses would be $181,731 per year.

Based on a minimum annual net income of $104,000, the amount needed would be $81,178 a year for Mrs. Firestone and her 4-year-old son Mark, Mrs. Biely said.

The annual Firestone income was derived by estimating a minimum gross income of $350,000, less fixed expenditures and taxes, and a maximum gross income of $600,000, less fixed expenditures and taxes.

Firestone's fixed expenditures were estimated to be about $131,000 a year. Taxes were estimated to be from 50 to 75 per cent of the gross income.

On a monthly basis, the minimum amount needed to cover Mrs. Firestone's expenses would be about $6,750 and the maximum about $15,100, Mrs. Biely said.

Mrs. Firestone in her complaint for separate maintenance and child support seeks an $8,700 monthly sum from Firestone.

Mrs. Biely's figures were based on statistics from the U.S. Bureau of Labor in the category of urban southern high income families.

The trial, in which the first actions were filed in 1964, is expected to be concluded this week.

Firestone Denies Reconciliation

FEB 10 1967

Testimony in the Firestone divorce trial continued this afternoon behind courtroom doors closed to the press and the public.

On the witness stand this morning when Circuit Court Judge James R. Knott ordered the courtroom cleared was Dr. Edgar Kellerman, the psychiatrist who had treated Mrs. Mary Alice Firestone when she was declared mentally incompetent in November, 1964.

A second psychiatrist was on the stand this afternoon in the closed session.

Shortly before the trial reconvened after noon recess, Russell A. Firestone Jr., the estranged husband, presented members of the press with copies of a personally signed letter which stated, "There is absolutely no possibility of a reconciliation" between him and his estranged wife.

The letter was written "as a result of continuing efforts on the part of my estranged wife, Mary Alice Sullivan Firestone, to imply to newspapers and television that a reconciliation is impending between us," the letter read.

In the letter, Firestone further accused Mrs. Firestone and her attorney Joseph Farish Jr. of having "brought into court innodent people, falsely and maliciously accusing them and thus deliberately holding them up to the glare of publicity."

Firestone concluded the letter saying, "Because I sincerely feel that she has not conducted herself during the course of our marriage in a manner benefitting a faithful wife and mother, it is impossible for me to contemplate a reconcilia and, therefore, the rumors are unfounded in truth."

Dr. James F. Cooney, neurosurgeon, was expected to testify later in the afternoon. It was expected the courtroom would be open to the press and public for his testimony.

Firestone Case Delayed

FEB 1 1967

The much delayed Firestone divorce trial, scheduled te resume Monday in Palm Beach County Circuit Court, has been delayed again and is now to begin Wednesday.

The two-day postponement reportedly is due to a conflict in trial schedules of Joseph Farish Jr., attorney for Mrs. Mary Alice Firestone, and also due to a lack of courtroom space.

The divorce case between Russell A. Firestone, Jr., and his wife began in July, 1966, and adjourned after one week's testimony. The case resumed Nov. 10 before Circuit Court Judge James R. Knott and recessed after one day's testimony when Mrs. Firestone became sick and was taken to the hospital.

Legal action between the couple began in 1964 when Mrs. Firestone filed a complaint for separate maintainance and child custody seeking monthly payments of $8,700 from her husband.

Firestone filed a counter-suit against Mrs. Firestone asking for a divorce on the grounds of cruelty and adultery.

Firestone Trial Bars Newsmen

FEB 10 1967

The public and the press were barred from the courtroom this morning when Dr. Edgar Kellerman, a psychiatrist who treated Mrs. Mary Alice Firestone when she was adjudged mentally incompetent in November 1964, took the witness stand in the Firestone divorce trial.

When Dr. Kellerman was called to testify, the long-haired brunette Mrs. Firestone, dressed today in a pink knit sheath, hurriedly left the courtroom, her face contorted in anguish.

In previous medical testimony, Mrs. Firestone had been alleged to have suicidal tendencies and emotional instability in the period following a near fatal car accident.

Attorneys for Russell A. Firestone Jr.; Joseph Farish Jr., Mrs. Firestone's attorney; and Dr. Kellerman conferred with Circuit Court Judge James R. Knott concerning clearing the courtroom.

The continuing divorce trial got off to a late start today when a subpoenaed witness, Dr. James F. Conney, was not present. Dr. Cooney was reportedly at a funeral.

The trial is expected to continue in March, in a session already scheduled.

Farish, attorney for Mrs. Firestone, said Thursday that he did not think the case would be completed today.

Firestone Case Near Windup; Arguments Due

Closing arguments in the Firestone divorce trial are to begin at 9 a.m. Tuesday before Palm Beach County Circuit Court Judge James R. Knott.

Legal and marital troubles between Russell A. Firestone Jr., heir to the Firestone fortune, and his estranged wife, Mary Alice, began in 1964 when Mrs. Firestone filed a complaint for separate maintenance and child custody.

She sought monthly payments of $8,700 from her husband for herself and the Firestone child, Mark, 4.

Firestone filed a counter-suit for divorce on the grounds of cruelty and adultery.

Actual courtroom proceedings in the divorce trial began in July, 1966, and continued on and off through March 12, 1967, at which time both sides rested their case.

Countless witnesses have testified in the long-running trial, and an equal number of exhibits have been entered in the case as evidence.

Case Will Be Resumed

Action in the Russel A. Firestone Jr. divorce trial resumes Monday in Palm Beach County Circuit Court, before Judge James R. Knott, after a month's recess.

Shortly before the long-drawn-out trial was last recessed Feb. 10, Joseph Farish Jr., attorney for Mrs. Mary Alice Firestone, notified counsel for Firestone that he anticipated it would take at least two or three more days of testimony to complete his case.

Legal action between the couple began in 1964 when Mrs. Firestone filed a complaint for separate maintenance and child custody, seeking monthly payments of $8,700 from her husband.

Firestone filed a counter-suit asking for a divorce on the grounds of cruelty and adultery.

The divorce case began in July, 1966, and adjourned after a week's testimony to resume again for one day, Nov. 10. Mrs. Firestone became sick and was taken to the hospital, necessitating a recess.

Scheduled to resume Feb. 6, the trial had to be postponed to Feb. 8 because of a conflict in trial schedules of Mrs. Firestone's attorney, and lack of courtroom space.

Judge Knott recessed the trial until Monday in the last court action heard Feb. 10 in a session closed most of the day to the press and public.

BEST COPY AVAILABLE

Firestone Hearing To Resume

By FRANK MESSERSMITH
Staff Writer

Barring any further delays due to conflicting court schedules or lack of courtroom space, the long awaited, recess-plagued Firestone divorce trial will begin Wednesday morning in the Palm Beach County Courthouse before Circuit Court Judge James R. Knott.

The divorce case between Russell A. Firestone Jr., heir to the Firestone tire and rubber fortune, and his estranged wife, Mary Alice, was originally to have begun Monday.

The two-day recess was ordered when Joseph Farish Jr., attorney for Mrs. Firestone, informed the court that he would possibly be embroiled in a lawsuit in Miami until the middle of the week.

It was also noted that if the trial began Monday, as was ordered in November of last year, the legal proceedings would probably have to be held in Judge Knott's hearing chamber because both Circuit courtrooms are scheduled to be occupied.

Trying to pack all the defense and prosecution witnesses, spectators, courthouse employes and a large battery of newsmen into Judge Knott's hearing chambers would be about as easy as putting Moby Dick into a tuna-fish can.

It has been estimated that more than 100 witnesses have subpenaed to testify through the course of the trial.

In the two years and two months since Mrs. Firestone first filed a separate maintenance suit against Firestone, the case has been in actual trial proceeding for only one week and one day.

The first of two separate maintenance suits entered by Mrs. Firestone, a former West Palm Beach school teacher, was filed on Nov. 12, 1964.

Circuit Court Judge Culver Smith dismissed the suit, stating that Mrs. Firestone's legal incapacity would not allow her to bring suit. County Judge Paul T. Douglas, only 10 days before the suit was filed, had ruled that the woman was a mental incompetent with suicidal propensities and emotional instabil- followed by about a half-year, a near-fatal car accident in which Mrs. Firestone suffered severe head injuries.

On July 5, 1965, the Bank of Palm Beach and Trust Co., as court-appointed guardian of Mrs. Firestone's assets, filed another separate maintenance suit seeking custody of the Firestone's son, Mark Allen, now five, and $8,700 in support and alimony payments.

Attorneys for Firestone filed a counter-claim, seeking a divorce on the grounds that Mrs. Firestone was guilty of cruelty and adultery.

On Dec. 17, 1965, Judge Douglas ruled that Mrs. Firestone was again mentally competent and he discharged her custodians.

The much publicized and rumor-riddled trial finally began in July of 1966. It lasted one week.

However, that week, which was used by Firestone's attorneys to present his side of the suit, heard testimony that was of such alleged "scandalous nature" that the press and the public was barred from court room much of the time.

After the week of testimony, Judge Knott recessed the trial until Nov. 10.

One month following the recess, in August, Mrs. Firestone signed criminal warrants against Mrs. Myrna Odell, of Miami, charging her with adultery, fornication and lewd and lascivious behavior in connection with Firestone.

In court proceedings in Miami, Mrs. Odell was cleared of the charges.

A contempt of court charge by her husband soon followed Mrs. Firestone's action. The charge claimed that Mrs. Firestone and her attorney were allegedly violating a restraining order signed by the judge

A decision on the contempt charge has been withheld by Judge Knott until divorce proceedings resume.

On Nov. 10, 1965, the trial again resumed and witnesses for Mrs. Firestone to take the stand.

The former school teacher was not present at the one-day stand. She had been rushed to Good Samaritan Hospital on Monday for a reported stomach disorder.

In the day-long hearing which was open to the press and the public for about two and one half hours, nine witnesses took the oath before the court. Two of the witnesses, a man and a young man and a young woman, both unidentified mystery witnesses, took the stand in a three-hour closed door session.

Judge Knott, after the one-day trial, ordered the case to be recessed until Feb. 6, 1967. Another session for the week of March 13 had also been scheduled by Judge Knott.

MAR 17 1967

May Face Perjury Charge

By FRANK MESSERSMITH

Staff Writer

Attorneys for Russell A. Firestone Jr. concluded their rebuttals shortly before noon Thursday, leaving only closing arguments to bring the much-delayed Firestone divorce trial to a close.

Circuit Court Judge James R. Knott said that he will not be able to hear the closing arguments today because he has a previous appointment that will occupy most of his day.

The arguments will be heard at a future date to be agreed upon by the counsels for Firestone and his estranged wife Mary Alice after they have had time to review the case.

Judge Knott said that one attorney had indicated that he would need about three hours to present his closing argument. The Judge said he expects the other side will request similar time.

It had been anticipated Monday that the trial would be concluded by the end of this week.

The judge informed the attorneys that if they wished, he would be able to meet with them at 2:15 p.m. today to discuss motions for attorneys fees.

Before recessing the trial shortly before noon Thursday, Judge Knott ordered County Solicitor Marvin U. Mounts to begin investigations to determine if perjury charges should be filed against a woman who had testified previously in the trial for Mrs. Firestone.

The action was taken by Judge Knott after a letter was entered as evidence Thursday which indicated that the woman, Mrs. Joyce Simms, a former secretary to Firestone, had lied under oath.

The letter had been mailed by Mrs. Simms to her second husband James T. Nicholson III, who is presently a student at George Washington University in Washington, D. C.

Mrs. Simms said in the letter that she had lied to help Mrs. Firestone get the custody of the Firestone's four-year-old son Mark.

"I lied on the deposition just to help Mrs. Firestone get her baby because I can imagine what it's like to be without your baby," the letter said.

Mrs. Simms, who has assumed the name of her first husband, Charles Simms, is presently separated from Nicholson, who is trying to have the marriage annulled.

The alleged lie referred to by Mrs. Simms concerned her testimony involving an alleged illicit affair between herself and Firestone when she was his secretary.

Mrs. Simms had earlier admitted that she had been intimate with Firestone. In the letter, she told her husband that "I only worked for Mr. Firestone. I wasn't his girl friend."

County Solicitor Mounts, when asked if perjury charges would be filed against Mrs. Simms, said Thursday evening, "It's unfair for me to make any comment on a matter which might be under investigation by this office."

APR 25 1967

Two New Suits Hit Firestone

Russell A. Firestone Jr., already plagued with marital difficulties, Monday was faced with two federal suits filed in Miami asking more than $40,000 in damages.

One suit, filed by R. James Pfeiffer of El Segundo, Calif., asserts the Palm Beach County resident defaulted on payments after leasing an airplane and two helicopters.

In the other action, Aerospace Leasing Corp., also of El Segundo, seeks more than $15,000 damages. The firm alleges that one of its helicopters was involved in a crash and that Firestone had agreed, but failed to pay, insurance premiums on the helicopter. In order to get the benefit of the policy, Aerospace charged that it was forced to pay the remiums.

Final arguments in Firestone's marathon divorce action against Mary Alice Firestone and her suit for separate maintenance are scheduled to be heard in Palm Beach County Circuit Court May 9.

Firestone Witness

MAR 16 1967

Says Wife Lied

The husband of a former secretary of Russell A. Firestone Jr., testified today in the continuing Firestone divorce trial that his estranged wife had lied under oath to benefit Mrs. Mary Alice Firestone.

The witness, James T. Nicholson, now a student at George Washington University in Washington, D.C., said that his wife had said in a letter that she lied to help Mrs. Firestone get custody of the Firestones' son Mark, 4.

"I lied on the deposition just to help Mrs. Firestone get her baby because I can imagine what it's like to be without your baby," the letter stated.

The former secretary, Mrs. Joyce Sims, who has assumed the name of her former husband Charles Sims, has a child by her marriage to Sims.

In another portion of the letter, which was entered as evidence today, the former Firestone secretary said she had been instructed by Mrs. Firestone's attorneys as to what she should say in the deposition.

Nicholson presently is separated from Mrs. Sims and is seeking to have their marriage annulled.

Mrs. Sims was involved in earlier testimony in the long-running Firestone trial as a former secretary allegedly romantically involved with Firestone.

Pictures taken by private investigators were entered in evidence in the trial which allegedly portrayed Firestone and Mrs. Sims in a compromising situation at Firestone's business office.

In the letter entered today, Mrs. Sims told Nicholson, "I only worked for Mr. Firestone. I wasn't his girl friend."

One other witness, Daniel Moran, 115 S. Ocean Blvd., Palm Beach, appeared as a witness for Firestone today.

Exhibit to Wilson Affidavit

Mrs. Firestone Motion Denied

MAR 31 1967

Circuit Court Judge James R. Knott denied Thursday a motion by Mary Alice Firestone to quash a petition to show cause why she should not be held in contempt of court.

The petition was filed last fall by Russell A. Firestone Jr. in divorce action against his wife for an alleged violation of a court order stipulating that neither party harass nor annoy one another while their case was in the court.

Firestone in the petition alleges that Mary Alice and her attorney, Joseph D. Farish Jr., kept watch on a home at 2525 Sunset Drive, Sunset Island, No. 2, Miami Beach, last September.

As a result of the surveillance Mrs. Myrna O'Dell, one of the principals in the divorce action was charged with lewd and lascivious behavior but it was dismissed by a justice of the peace in Miami.

Final judgment on the divorce action has yet to come in the case which has been in the courts since late 1965.

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Exhibit to Wilson Affidavit

Firestone Trial Again Delayed

FEB 2 1967

Scheduled to resume Monday, the oft-delayed Russell A. Firestone Jr. divorce trial has been postponed until Wednesday in Palm Beach County Circuit Court. This postponement is reportedly due to a conflict in trial schedules of Joseph Farish Jr., attorney for Mrs. Mary Alice Firestone and to a lack of courtroom space.

The divorce case bagen in July, 1966 and adjourned after a week's testimony to resume again for one day Nov. 10. The second phase of the case recessed when Mrs. Firestone became sick and was taken to a hospital.

Firestone Divorce Trial Resumes In County Court

MAR 1 3 1967

The long-run Firestone divorce trial resumed today in Palm Beach County Circuit Court in a courtroom conspicuously empty in comparison to previous sessions.

Spectators, newsmen and court witnesses previously had crowded the courtroom benches to view the proceedings of the divorce suit, to be periodically barred from the trial when testimony allegedly became scandalous.

Mary Alice Firestone's attorney, Joseph Farish Jr., told the court today he may rest his case by Tuesday.

The marital problems between Mrs. Firestone and her husband, Russell A. Firestone Jr., began in 1964 with a complaint for separate maintenance and child custody filed by Mrs. Firestone.

The counter-suit for divorce by Firestone followed, laying the grounds for the long-contested trial.

Testifying today was Mrs. Helen Nelson of Lantana, a maid at a Palm Beach motel.

She was questioned concerning what she had observed while working Nov. 18-20, 1966, at the Palm Beach Holiday Inn.

Firestone and Mrs. Myrna Odell, a female acquaintance of the heir to the Firestone tire and rubber fortune, allegedly stayed in ajoining rooms at the motel during the time in question.

Mrs. Nelson identified Firestone as being the person occupying a designated motel suite during that period.

Firestone Divorce Trial Recessed Until March 13

FEB 1 1 1967

The Firestone divorce trial has been recessed until the week of March 13.

Circuit Court Judge James R. Knott heard the testimony of six witnesses Friday in a courtroom closed most of the day to the press and public.

Judge Knott ordered the courtroom emptied for the first time in three days of testimony when Dr. Edgar A. Kellerman, a psychiatrist who treated Mrs. Firestone in 1964, took the stand.

Anoth psychiatrist, Dr. William H. Everts, and a neurosurgeon, Dr. James Cooney, both of whom treated Mrs. Firestone after a near-fatal car accident, also testified.

Dr. Cooney in open court, stated that Mrs. Firestone had received fractures of the skull and a shoulder blade in the accident. He further testified that a person frequently will be mentally unstable for a period of months after such an accident. Psychiatric care had been recommended several times for Mrs. Firestone after she had been released from the hospital, the doctor stated.

During noon recess Firestone handed each member of the news media present a personally signed letter which stated, "There is absolutely no possibility of a reconciliation" between him and his wife.

The letter also stated, "Because I sincerely feel that she has not conducted herself during the course of our marriage in a manner befitting a faithful wife and mother, it is impossible for me to even contemplate a reconciliation . . ."

Firestone said he wrote the letter without consulting his attorneys.

The court was opened to the press in the afternoon to hear testimony of the remaining witnesses called by Mrs. Firestone's attorney.

Mr. and Mrs. John Galbreath, Firestone's mother and stepfather, were called to testify concerning their introduction to Mrs. Firestone and Firestone's alleged acquaintance with Mrs. Myrna Odell.

The Firestones' marital troubles first reached the courts in 1964 when Mrs. Firestone filed a complaint for separate maintenance and custody of their son Mark, 4, and asking for $8,700 per month support money.

Firestone, in counter-suit, is seeking a divorce from his estranged wife on the grounds of cruelty and adultery.

Mrs. Firestone Mentally Com

DEC 17 1965

Mary Alice Firestone, estranged wife of rubber company heir Russell A. Firestone Jr., was found mentally competent Thursday by County Judge Paul Douglas.

Judge Douglas, who Nov. 2, 1964, found Mrs. Firestone mentally incompetent, said he based his ruling on favorable reports from two psychiatrists.

The hearing on Mrs. Firestone's request was held at 11 a.m. Thursday.

Mrs. Firestone, 29, was found incompetent shortly after she filed suit for separate maintenance from her husband, whom she married in 1961.

Since the incompetency ruling, she has been in the custody of her brother Charles Turner, as guardian of her person, and the Bank of Palm Beach and Trust Co., as financial guardian.

The couple's son, Mark Allen, 2, has been with his father since his parents separated.

Lawsuits filed in Mrs. Firestone's behalf by her guardians said that Firestone took the boy from the family's Palm Beach home in the fall of 1964 and that Mrs. Firestone has only been

Mrs. Firestone Claims Jewelry

MAR 11 1965

Mrs. Mary Alice Firestone, estranged wife of Russell A. Firestone Jr., heir to the Firestone millions, claims $3,832.27 in cash as personal property as well as 10 pieces of jewelry, according to legal papers in the County Probate Court.

The jewelry, listed under tangible personal property, has not yet been appraised, but consists of:

One diamond and ruby bracelet; one diamond and gold flowered bracelet; two diamond and gold bracelets; two matched diamonds and gold bracelet; one pair of diamond and gold teardrop earrings; on diamond and gold pear shaped pin; mond and Gold pear shaped pin; one U shaped diamond ring and one string of 65 matched pearls.

The list also included one gold case for a lipstick brush and one gold compact with diamond chips.

DEC 3 0 1966

She Says $s Stolen

A Palm Beach woman who was arrested early today on a traffic charge filed a complaint of missing money with West Palm Beach police.

Mrs. Mary Alice Sullivan Firestone, 23, of 236 Pendleton Ave., said four $50 bills vanished between the time her car was stopped at 3 a.m. and her release at 5 a.m. into the custody of attorney Joseph Farish.

She was charged with driving while under the influence of intoxicants and careless driving by weaving. A court appearance was set for 9:30 a.m. Jan. 9, but police indicated the date might be reset if requested.

Patrolman David A. Hughes made the arrest at Westwood Road and S. Dixie Highway after following Mrs. Firestone's rented car several blocks while it weaved back and forth across the street, he reported.

When her car was stopped, Mrs. Firestone got out laughing and threw her arms around his neck, the policeman said. A passenger in the car, Daniel Eiswerth, was permitted to leave.

Hughes said Mrs. Firestone had some money in her hand when he saw her in the car, but at the police station, officers said they found only $39 in her purse.

Mrs. Firestone's Lawyers In Court

MAR 2 1967

Attorneys for Mrs. Mary Alice Firestone Monday filed in circuit court a motion to file a second amended complaint for alimony and support "unconnected with the causes of divorce."

In the motion, it was noted that the county court had appointed J. Luther Drew as guardian of her property and that the Bank of Palm Beach and Trust Co., former guardian of her property, has been released from further duties.

In asking for separate maintenance, the motion asked the court to order her husband Russell A. Firestone Jr., to "make proper and suitable provisions and pay temporary alimony."

It alleged that he is worth more than $10 million and has an annual income of $100,000. Formerly he provided her with $3,000 per month for personal income, the motion said.

Contempt Hearing Ordered For Mary Alice, Attorney

SEP 21 1966

Mrs. Mary Alice Firestone and her attorney Joseph D. Farish Jr. Tuesday were ordered to appoar in Palm Beach County Circuit Court Oct. 20 to answer charges of contempt of court.

Circuit Court Judge James R. Knott issued the order after a petition seeking the contempt charges was filed by attorneys for Mrs. Firestone's estranged husband, Russell A. Firestone Jr.

The motion contends that Mrs. Firestone and her attorney violated a Jan. 26 restraining order signed by Judge Knott by setting up a lookout outside of a house occupied by Firestone in Miami Beach.

Cited as evidence in the petition is testimony given by Mrs. Firestone in a Sept. 2 preliminary hearing before Miami Peace Justice Jason Berkman.

Mrs. Myrna Odell, a companion of Firestone's, was freed by Berkman after she had been named in criminal warrants signed by Mrs. Firestone charging adultery, fornication and lewd and lascivious behavior.

The petition for the contempt proceedings states:

"From the testimony of Mary Alice Firestone it is abundantly clear that the said plaintiff and counter defendant did openly and flagrantly violate (the restraining order)."

The former school teacher and Firestone were married in 1961. Following their separation in Oct. 1964 she sued her husband for separate maintenance. Firestone has filed for divorce.

In January of this year Judge Knott issued the contested restraining order which reads

"Neither party, through their agents, servants or employes shall annoy or harass the other directly or indirectly, by any means whatsoever, including but not limited to surveillance by private detectives, wire tapping telephones or any other such tactics."

In a related court action Tuesday, attorney Farish filed subpoenas in Circuit Court seeking depositions from Mrs. Peter Odell of Miami and Jean Bell and Eve Spears, both of whose addresses were listed as Jean Berry Fashions, Coral Gables.

Farrish also asked that Southern Bell Telephone and Telegraph Co. be subpoenaed to produce records pertaining to a residence at Sunset Isle Number 2, Miami Beach, and that the Sunset Isles produce records pertaining to the occupants of that residence.

The Firestone divorce trial is scheduled to be resumed Nov. 7. It was recessed July 15 following one week's testimony.

Contempt Hearing Set For Mrs. Firestone

OCT 20 1966

A hearing to determine if Mrs. Mary Alice Firestone and her attorney, Joseph D. Farish Jr., should be held in contempt of court is scheduled today before Circuit Court Judge James R. Knott.

The hearing is a result of a petition filed Sept. 20 by Russell A. Firestone Jr., Mrs. Firestone's estranged husband. According to Firestone's petition the pair violated a Jan. 26 restraining order signed by Judge Knott.

The judge prohibited both Mrs. Firestone and her husband, who are involved in a separate maintenance and divorce action, from annoying or harassing each other "directly or indirectly, by any means whatsoever."

In his petition for today's hearing, Firestone alleged that his wife and Farish spied on his residence in Miami Beach. Included with the petition was a transcript of testimony given by Mrs. Firestone Sept. 2 before Miami Peace Justice Jason Berkman.

"From the testimony of Mary Alice Firestone," the petition reads, "it is abundantly clear that the said plaintiff and counter defendant did openly and flagrantly violate (the restraining order)."

The hearing before Berkman stemmed from criminal warrants signed by Mrs. Firestone charging Mrs. Myrna Odell of Miami with adultry, fornication, and lewd and lascivious behavior."

Mrs. Odell, a companion of Firestone's, was freed of the charges when Berkman ruled that there was insufficient evidence to bind her over for trial.

The Firestone's divorce trial, which was recessed July 15 after one week's testimony, is scheduled to resume Nov. 7.

FEB 7 1964

Mrs. Firestone's Condition Poor

The wife of Russell A. Firestone Jr., heir to the Firestone rubber millions, remained in poor condition this morning at Good Samaritan Hospital following a Wednesday night traffic accident.

Mrs. Mary Alice Firestone, 28, a passenger in her sports car when it spun out of control into a culvert along Belvedere Road, suffered a fractured skull. Driving the car was Michael G. McLain, 20, of 4168 Bougainville Road, who told officers he was a plasterer.

Sheriff's deputies said the 1961 Ferrari was headed east on Belvedere Road just east of Military Trail when it skidded out of control about 6:45 p.m. Damage was estimated at $3,000 to the car.

McLain was charged with operating a motor vehicle while his driver's license was under revocation or suspension. He reveived only minor injuries.

Exhibit to Wilson Affidavit

Exhibit to Wilson Affidavit 72

Farish Rests Case In Firestone Trial

MAR 1 5 1967

Joseph Farish Jr., attorney for Mrs. Mary Alice Firestone, rested his case this morning following the testimony from the last witness in the continuing Firestone divorce trial.

Circuit Court Judge James R. Knott recessed the trial following the testimony of Charles Turner, Mrs. Firestone's brother.

Rebuttals in the case were to start when the trial reconvened at 2 p.m. today.

Turner, the only witness called today, testified concerning the period when he was his sister's legal guardian, after she had been declared legally incompetent in 1964.

He also was questioned about the relationship of his sister and her husband, Russell A. Firestone Jr. after they separated.

"He said he (Firestone) loved her and wanted to go out with her," Turner said.

"He has expressed that same similar feeling on several occasions," Turner said. "I think that is the way he has always felt."

On one occasion, Turner said, Firestone wanted to accompany him and his sister to dinner but said he could not go because "Myrna (Mrs. Myrna Odell, a female acquaintance of Firestone's) would be mad like Joyce."

Turner apparently was referring to Miss Joyce Sims, a former secretary to Firestone.

The long-running divorce trial is expected to conclude at the end of the week.

Mary Alice Signs Warrants Against Woman

AUG 26 1965

A frequent companion of tireheir Russell A. Firestone Jr. has been named in criminal warrants signed by Firestone's estranged wife, Mary Alice.

Mrs. Myrna O'Dell, former by-line writer and social columnist for The Post-Times, Miami News and Miami Herald was named in the warrants served late Tuesday night in Miami Beach.

The warrants charge fornication, adultery and lewd and lascivious behavior. They are returnable on Sept. 2 before Peace Justice Jason Berkman who issued the warrants on Tuesday.

Miami Beach deputy constables served the warrants which refer to the man with whom the alleged acts took place merely as "John Doe."

Mrs. O'Dell emphatically denied any such misconduct. Other news media have quoted Mrs. Firestone as offering no comment other than "Ha, ha, ha."

Court Upholds Firestone Plea

MAR 3 1 1967

A petition filed by Russell A. Firestone Jr. in his divorce action against Mary Alice Firestone was upheld Thursday by Circuit Court Judge James R. Knott.

The petition, against the woman, was for an alleged violation of a court order stipulating that neither party harass or annoy the other while the case was in the court.

Mrs. Firestone had attempted to quash the petition to show why she should not be held in contempt of court.

In the petition, Firestone alleges that Mary Alice and her attorney Joseph D. Farish Jr. surveilled a home at 2525 Sunset Drive, Sunset Island, No. 2, Miami Beach last September.

Final judgment on the divorce action has yet to come in the case which has been in the courts since late 1965.

Strangers in the Night

SS 6/14/78

Mary Arpe, who lives in Palm Beach on Mediterranean Road, is 17 years old.

On Friday, June 5 Mary and a friend, Francis VanLeuven, also of Palm Beach and also 17, graduated from high school. After graduation, they went to a party in Jupiter and were returning home along North Lake Way.

It was shortly before 2 a.m. Saturday, June 6, and the teenagers were driving north along North Lake Way at the Miraflores Drive intersection.

"I don't know where the car came from," Mary said later, "but suddenly we were hit. I was driving . . . I looked in the rear view mirror, I could see lights."

Mary continued her northbound course, then turned east into a 300 yard-long driveway.

"I drove down to the end of the drive, to call the police," Mary said, "but nobody was home, so I walked down the drive and crossed the street to another house."

Mary did call the police. Their records show the call came in at 2:02 a.m. But when officer E.B. Milner arrived at the scene a few minutes later, he found another car . . . this one southbound and resting against a palm tree on the east side of North Lake Way with its nose resting some eight feet up the tree.

"Were you the only one involved," Milner asked Albert A. Silvers of Chicago who said he was the driver.

Milner said Silvers told him Mrs. Mary Alice Firestone, who was riding in the car with him, had been injured and had been taken to the hospital.

"I had to have at least 16 stitches inside my lip," Mrs. Firestone said later. "I was in shock and I really don't remember anything much after the accident . . . I don't remember seeing who hit us."

Silvers told police the car which struck the automobile he was driving disappeared without stopping. He was unable to describe the car.

Then Officer Milner found Mary Arpe who showed him her car parked in the driveway nearby.

According to police reports, the Arpe auto sustained damages to the left front and front with the Silvers car damaged at the left rear.

When Milner filled out his report Saturday morning, he typed it on one accident record.

Later he filled out two separate accident reports. Each was described as a hit and run accident by an unknown vehicle.

The investigation of both accidents was closed by Saturday morning.

Monday Police Chief Mead said he saw no need to continue the investigation or the search for two hit-and-run drivers.

"After all," he said, "it wasn't a homicide."

Firestone Tot Custody Awarded To Mother

JAN 19 1966

By PAUL MEIGHAN
Staff Writer

Mrs. Mary Alice Firestone was awarded temporary custody of her three-year-old son Mark Allen Firestone at a circuit court hearing Tuesday afternoon.

Judge James R. Knott ruled after counsel had stipulated to the temporary arrangement.

The judge took under advisement a plea for temporary support in the sum of $8,370 after hearing three hours of testimony.

Mrs. Firestone is suing Russell Firestone Jr., industrial heir, for separate maintenance, attorney fees, and permanent custody of the couple's son.

They were married in New York in August 1961 and separated in late October 1964.

Judge Knott told the estranged couple that neither was to take the child out of Palm Beach County without the court's permission.

It was further stipulated there would be no effort on the part of either parent to invade the privacy of the other.

The custody ruling, marking the first half of the afternoon activities, came shortly before 4 p.m.

Judge Knott next turned to the question of temporary support for Mrs. Firestone and her son. Money matters consumed the next two hours.

Mrs. Firestone took the stand, and testified that $8,370 a month was really not enough to live on.

She wants $300 a month for church and charity donations, instead of the $100 a month previously requested.

She said $5.00 a month is not enough for newspaper subscriptions and needs $17.50 because she has a liking for the New York Daily News and the New York Journal-American in addition to her local subscription.

She pegged her child's school tuition at $30 a month rather than the $25 originally asked.

This boosted the grand total to $8,587.50 a month.

Her original petition had included $2,000 a month clothing allowance; $238 a month for shampoos and sets; and $25 a month for the maintenance of the family poodle wash and clip.

She said she was accustomed to such a scale in the days she and Firestone were living as man-and-wife. She added that he

(Continued on Page 2, Col. 3)

(Continued From Page A1)

used to give her $3,000 a month allowance while picking up all the household expenses himself.

Firestone took the stand and denied he had ever been so generous. He claimed he had been sending Mrs. Firestone $1,000 a month temporary support for over a year. He estimated their living expenses at about $3,000 a month while the pair lived together.

He claimed he had paid all mortgage payments, taxes, insurance, and gardening fees for Mrs. Firestone's home, 236 Pendleton Ave., Palm Beach for over a year.

Everett B. Nowlen, 601 Flagler Dr. Ct., Firestone's accountant, was the final witness.

Russell Firestone's $12-million fortune is tied up in a trust administered by George Karch, president of the Cleveland Ohio Trust Co., Nowlen testified.

Judge Knott told attorneys it would take him a few days to study the pile of affidavits and financial statements. He said he would set the temporary support figure as soon as possible.

Mrs. Firestone's Condition Better

FEB 13 1964

The condition of Mrs. Mary Alice Firestone, wife of Russell A. Firestone Jr., heir to the Firestone millions, was improved today, according to a spokesman at Good Samaritan Hospital. She had been in serious condition with a skull fracture.

Mrs. Firestone was injured Feb. 5 in her sports car, in which she was a passenger when the vehicle spun out of control and struck a cuvert on Belvedere Road. Driver of the car was Michael G. McLain, 20, of 4168 Bougainville Road, according to police.

Mrs. Firestone Is Improving

FEB 20 1964

Mrs. Mary Firestone, wife of Russell A. Firestone Jr., heir to the Firestone fortune, continues to improve in her recovery from a skull fracture received in a Feb. 5 auto accident on Belvedere Road.

A spokesman Wednesday night listed Mrs. Firestone in "satisfactory" condition at Good Samaritan Hospital where she is currently undergoing treatment for her injuries.

Mrs. Firestone Leaves Hospital

Mrs. Mary Alice Firestone has been released from Good Samaritan Hospital where she was undergoing treatment for a skull fracture received in a Feb. 5 auto accident.

She is the wife of Russell A. Firestone Jr., heir to the Firestone Rubber fortune. They live at 236 Pendleton

MAR 5 1964

Palm Beach.

Brother Named Guardian For Mrs. Firestone

NOV 18 1964

Charles Turner, brother of Mrs. Mary Alice Firestone, has been appointed her guardian.

The 28-year-old wife of Firestone heir Russell A. Jr. was declared incompetent Nov. 2 by County Judge Paul T. Douglas after a three-man examining board found that she had suicidal propensities, memory defect, emotional instability with severe depressive episodes, and that she had attempted suicide a week earlier.

Turner, 757 Island Road, Palm Beach, petitioned County Court to have his sister declared incompetent. A bank will be appointed as guardian of Mrs. Firestone's property.

Monday Judge Culver Smith threw a separate maintenance suit brought by Mrs. Firestone against her husband out of court. He said a person declared legally incompetent cannot file a suit as an individual, but he said a guardian could file a suit on behalf of Mrs. Firestone.

One of Mrs. Firestone's attorneys said Tuesday he did not know if a new separate maintenance suit would be filed by Turner on behalf of his sister.

Court Dismisses Mrs. Firestone Maintenance Suit

NOV 17 1964

A separate maintenance suit filed by Mary Alice Firestone against her husband, Russell A. Firestone, heir to the Firestone millions, was thrown out of Circuit Court Monday by Judge Culver Smith.

Judge Smith dismissed the suit for lack of jurisdiction because the 28-year-old former Palm Beach Elementary School teacher, the former Alice Sullivan, has been legally declared incompetent.

A hearing scheduled for 11:30 a.m. today before County Judge Paul Douglas on a request that a guardian be appointed for Mrs. Firestone was late in starting. A guardian can bring a new suit on behalf of the woman, the judge explanied.

Mrs. Firestone was declared incompetent Nov. 2 by Judge Douglas after a three-man examining board found that she had suicidal propensities, memory defect, emotional instability with severe depressive episodes and that she had attempted suicide a week earlier.

Mrs Russell Firestone

HURRICANE HONEY—Mary Alice Sullivan, daughter of Mrs. A. J. Sullivan of 201 Sunset [illegible], was selected as a contestant for "The Hurricane Honey of the Year" contest held recently at the University of Miami. Miss Sullivan is a sophomore education major at the University and is a member of Delta Gamma Sorority. The "Hurricane Honey" title was awarded to Miss Nanita Greene at the Sun Carnival, the annual spring charity dance held at Dinner Key auditorium under the sponsorship of the University Student Body Government.

Exhibit to Wilson Affidavit 73

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Exhibit to Wilson Affidavit 74

77 Per Cent Of Firestone Net Asked For Mary Alice

MAR 15 1967

A consulting economist, a private investigator and four character witnesses for Mrs. Mary Alice Firestone appeared on the witness stand in the Tuesday session of the Firestone divorce trial.

The economist, Mrs. Margaret Bieley of Bieley, Wagner & Associates, Inc., of Miami and Washington, D. C., testified in connection with the amount of support money Mrs. Firestone would need from her husband Russell A. Firestone Jr., should a divorce be granted.

Charts were drawn in the courtroom by the economist detailing the amount and portion of Firestone's net income that would be needed to maintain Mrs. Firestone and the Firestones' son Mark, 4, at the economic level to which they are accustomed.

The amount needed, Mrs. Bieley testified, would be 77.5 per cent of the annual net income of the heir to the Firestone tire and rubber fortune.

A minimum gross income of $550,000 and a maximum gross income of $600,000 was used as basic figures in Mrs. Bieley's computations.

Based on those figures, Firestone's minimum net income would amount to $104,746 and his maximum net income would be $234,492 the economist said.

The net income is the amount Firestone would receive after his annual fixed expenditures, estimated at $131,015, and taxes were subtracted.

Based on the $234,492 maximum annual net income of Firestone, the amount needed by Mrs. Firestone to sustain herself and her on at the level to which they are accustomed would be $181,731 per year, Mrs. Bieley said.

On the basis of the $104,000 minimum annual income, Mrs. Firestone would need $81,178 for her family maintenance.

Broken down to monthly figures, the minimum amount needed by Mrs. Firestone would be $6,755 and the maximum would be $15,144, the witness said.

In her complaint for separate maintenance and child custody, Mrs. Firestone asked for $8,700 monthly support payments.

Mrs. Bieley also prepared a chart comparing Mrs. Firestone's predicted annual expenditures with figures and averages compiled in a study of persons listed in a category of urban southern high income families.

The only two estimates of yearly expenditures given by Mrs. Firestone that were higher than the national average involved money for recreation and clothing, Mrs. Bieley said.

The figures used by Mrs. Bieley were taken from research findings of the United States Bureau of Labor Statistics.

Others testifying Tuesday were The Rev. Samuel Lindsey, Catherine Obelinsky, and Mrs. Stephen Sanford, all of Palm Beach; Mrs. Firestone's brother Charles Turner; and a private investigator, Ted Keys Jr., of Palm Springs.

Attorney for Mrs. Firestone, Joseph Farish Jr., had said he hoped to rest his case by Tuesday. It is anticipated that he will continue through today.

Eviction Ruling Orders Mrs. Firestone To Vacate

NOV 19 1964

One day after her brother was named as her guardian, Mrs. Mary Alice Firestone was ordered evicted Wednesday from the Palm Beach house in which she has been living.

The 28-year-old former school teacher, wife of Firestone heir Russell A. Firestone Jr., was ordered by County Judge Paul Douglas to vacate the house at 757 Island Road by Monday and return to the Firestone home at 236 Pendleton Ave., Palm Beach.

Tuesday the judge appointed Mrs. Firestone's brother, Charles Turner, as her guardian. She was declared incompetent by Judge Douglas Nov. 2.

The judge's ruling followed an incompetency petition filed by her 27-year-old brother and an examination by two doctors, who said Mrs. Firestone had sucidal propensities and was emotionally unstable.

Mrs. Firestone filed a separate maintenance suit against her husband last week, but it was thrown out of court because she had been declared incompetent and therefore could not bring a suit as an individual.

The petition to evict her stated that Bethann Realties Inc., and Stephen Quackenbush Jr., owners of the Island Road hor rented the dwelling to Firest April 17. It said the rent v paid until Oct. 17, but at time Firestone refused to ex cise an option to extend lease agreement and mo out.

Mrs. Firestone continued reside there even though lease was terminated and has been asked by the owner move, the petition said.

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Firestone Legal Fees Discussed

The attorney for Mrs. Mary Alice Firestone may receive between $130,600 and $176,175 for his work in her 2 ½-year divorce trial which reconvened at 9:30 a.m. today.

The first order of business in the private chambers of Palm Beach County Circuit Court Judge James R. Knott this morning was a statement by Joseph Farish Jr., Mrs. Firestone's attorney, concerning the time he has given to the case and a reasonable fee to be paid him.

Closing arguments in the marital case involving Russell A. Firestone Jr., heir to the rubber fortune, and his wife are scheduled today if arguments about fees do not take up the time allotted the arguments.

Both sides said they may require two or three hours for closing arguments. If the fee discussions continue through the afternoon, it is possible the Firestone case may again be rescheduled for final arguments.

Meanwhile, Farish estimated that he recorded 1,056 hours in briefings, office time, conferences and interviewing witnesses in the period from December 1964, when he was employed, to the present.

Under oath, Farish also stated that he had recorded some 36 statements in Palm Beach County and 23 depositions outside of the county, had attended eight hearings and five court sessions.

Kirk Sullivan, a local attorney, was called to testify concerning a reasonable fee to be paid to Farish for his work. Sullivan testified that based on the fees paid other attorneys in Palm Beach County, a reasonable salary for Farish's work in the case would be $130,500.

Sullivan based his estimate on the figures of $50 per hour for office time, $100 an hour while recording depositions, $500 a day for out of town work and $500 a day for actual court hearings.

The attorney said he based his salary estimates not only on the relative success of the lawyer and the time he had put into a case, but also the ability of the defendant to pay.

"If a man cannot pay that sum, it should be reduced," Sullivan said.

If Farish is successful in winning a satisfactory judgment of all the disputed factors in the Firestone divorce trial, his fee should be increased from 25 to 35 per cent, Sullivan said. At the top estimate the fee might reach $176,175.

If he loses, Sullivan said he supposed the fee should be reduced.

NOV 17 1964

Brother Appointed Guardian Of Mrs. Mary Alice Firestone

A guardian was appointed today for Mrs. Mary Alice Firestone, wife of Firestone heir Russell A. Firestone Jr.

The 28-year-old woman was declared incompetent Nov. 2 by County Judge Paul T. Douglas, on grounds of suicidal propensities, memory defect, emotional instability with severe depressive episodes.

Charles Turner, identified as her brother, was appointed guardian of Mrs. Firestone. It was Turner who had petitioned county court to have his sister declared incompetent.

A bank, unnamed late today, will be appointed by Judge Douglas as guardian of Mrs. Firestone's property.

A separate maintenance suit by Mrs. Firestone against her husband was thrown out of Circuit Court Monday by Judge Culver Smith, who said a person declared legally incompetent cannot file a suit as an individual.

The judge noted, however, that a guardian could file a suit on behalf of Mrs. Firestone.

Charles A. Nugent Jr., one of Mrs. Firestone's attorneys, said today he didn't know if a new separate maintenance suit would be filed by Turner on behalf of his sister.

Mrs. Firestone is the former Mary Alice Sullivan, who once taught at Palm Beach Elementary School.

Mrs. Firestone Adds $50,000 Complaint

APR 16 1966

To a complaint for $50,000 in compensatory damages, Mary Alice Firestone added a complaint for $50,000 in punative damages, in a Circuit Court Suit filed Friday against a private investigator.

Mrs. Firestone, estranged wife of industrial heir Russell Firestone, is asking a total of $100,000 in damages from a private eye identified as Arthur J. Balletti, Miami.

Through her attorney, Joseph Farish Jr., she claims that in December, 1965, Balletti or his agents shadowed her, tape recorded her telephone conversations, and eavesdropped on her private life and activity.

The Firestone marriage went on the rocks a year ago and the couple has been engaged in a running battle since. He has filed for a divorce, complaining of cruelty and adultery. She has asked for separate maintenance and custody of the couple's three-year-old son.

Mrs. Firestone was the victor in their first legal skirmish. In January she was awarded temporary custody of Mark Allen Firestone, age three, and $2,000 a month temporary support.

The divorce case is scheduled to begin July 11, before Circuit Court Judge James R. Knott, who made the temporary award to Mrs. Firestone in January.

Judge Knott also enjoined both principals from annoying, shadowing, eavesdropping, recording telephone conversations or spying on one another.

The suit Friday claims that Balletti began to harass and intimidate Mrs. Firestone in December of 1965. She claims that sometime between Dec. 24 and Dec. 31, Balletti entered her home at 236 Pendelton Ave., Palm Beach, and attached secretly to her private telephone an electronic radio device.

Mrs. Firestone says that as a result of this alleged trespass and eavesdropping she has been brought into public ridicule, contempt and disesteem.

Lawyer's Fee For Firestone Case Not Set

MAY 1 1

West Palm Beach attorneys testifying in Tuesday's closing session of the Firestone divorce trial set a possible fee of from $43,500 to $95,000 for Joseph Farish Jr., the attorney who represented Mrs. Mary Alice Firestone.

The fee discussion preceeded the 3½ hours of closing arguments that brought to a close the long-running divorce suit between Russell A. Firestone Jr., and his estranged wife.

Attorney Kirk Sullivan told the court that Farish should be paid $77,250 for his work on the Firestone case, which he assumed in December, 1964..

Farish had testified that he had logged 1,065 hours while working on the case, had taken 62 depositions, and had appeared at eight court hearings and five court sessions.

Sullivan was incorrectly named in the Wednesday Palm Beach Post as saying that Farish should receive $130,500 in fees.

Attorney Edgar Hamilton, who testified following Sullivan, contended that Farish should be paid between $85,000 and $95,000 for his services.

Marshall Criser, president elect of the Florida Bar Association, called by attorneys repesenting Firestone, testified that Farish should receive a fee of $13,500 for his work.

$250,000 Jewel Theft Reported

JUL 2 '63

Mrs. Russell Firestone, former Palm Beach schoolteacher who married a millionaire, told police she was robbed of more than a quarter-million dollars worth of jewelry at Arlington Heights, Ill., Monday.

Mrs. Firestone, 26, said she and her brother, Charles Turner, 24, Big Springs, Tex., were approached by two men as they returned from the Arlington Heights race track Monday.

"Close your eyes or I'll shoot," Mrs. Firestone told police one of the men said. She said he then told his partner, "Get that ring."

"That ring", police said Mrs. Firestone told them, was the 28½-carat diamond her husband gave her when they were married in August, 1961. It was valued at $250,000, Mrs. Firestnoe said.

She also reported the loss of a white leather bag containing a gold mesh, coin purse, a gold lipstick case and gold pill box, valued at $3,800. Mrs. Firestone told police the men also took $48 in cash, but missed a $4,000 diamond pendant.

Her husband was returning to the home they had rented in another car, she said.

The Firestones are visiting in Arlington Heights during the racing season.

Mrs. Firestone is the former Mary Alice Sullivan, daughter of Mrs. A. J. Sullivan of 236 Pendleton Ave., Palm Beach.

She taught the fifth grade at Palm Beach Elementary School before her marriage to the heir to the Firestone millions. It was her first marriage and his third.

The couple, who maintain a winter home on Ocean Boulevard at Palm Beach, have a son born in January, 1963, at Good Samaritan Hospital here.

Exhibit to Wilson Affidavit 75

Exhibit to Wilson Affidavit 76

Income Discussed In Firestone Case

MAR 1 5 1967

Mrs. Mary Alice Firestone, according to figures cited by a consulting economist at the Firestone divorce trial Tuesday afternoon, is entitled to a minimum of $81,178 and a maximum of $181,731 annual maintenance support if the divorcee from her husband is granted.

Mrs. Margaret Nieley of Nieley, Wagner & Associates, Inc., of Miami and Washington, D.C., produced charts in the courtroom detailing the amount and portion of the Russell A. Firestone Jr. net income that would be needed to maintain Mrs. Firestone and the Firestones' son, Mark, 4, at the economic level to which they are accustomed. That amount, Mrs. Nieley testified as a defense witness, would be 77.5 per cent of the Firestone tire and rubber fortune heir's annual net income.

Using a minimum gross income of $550,000 and a maximum gross income of $600,000 as Firestone's annual income the economist concluded that, after taxes and fixed expenditures, Firestone would net a maximum of $234,492 or a minimum of $104,000. From these figures, she deducted the annual support payments that Mrs. Firestone should be entitled to.

Also testifying at Tuesday's session, were The Rev. Samuel Lindsey, Catherine Obelinsky, and Mrs. Stephen Sanford, all of Palm Beach; Mrs. Firestone's brother Charles Turner and Ted Keys Jr., a private investigator from Palm Springs.

Joseph Farish Jr., Mrs. Firestone's attorney, had predicted resting his case by Tuesday, but apparently will continue through Wednesday.

Bank Asks Out As Guardian

FEB 17 1965

The Palm Beach Bank and Trust Co. has petitioned the County Probate Court to allow it to resign as guardian of Mrs. Mary Alice Firestone's property interests.

The bank has listed Mrs. Firestone's personal checking account balance at the Atlantic National Bank as down to $8.60. In a report filed Tuesday, the bank also lists three payments received from her husband, Russell A. Firestone Jr., heir to the Firestone millions, totaling $4,000. They give the total of her principal receipts since their Nov. 23 appointment as guardian at $4,008.60.

Mrs. Firestone, declared a mental incompetent last Nov. 2, is seeking separate maintenance and custody of their son in a running legal battle sparked with motions, counter motions and preliminary hearings in Circuit Court here.

Last week Mrs. Firestone's lawyers, Miller, Cone, Owen, Wagner and Nugent, were replaced by Joseph Farish Jr.

Fred O. Dickinson, Frederick C. Prior, William J. Pruitt, Robert L. Earnest and Wallis E. Schulle are representing Firestone.

In requesting legal authority to withdraw as property guardian to the 28-year old former Palm Beach schoolteacher, the bank lists her present tangible personal property, as yet unappraised, as 11 pieces of jewelry and interest in a Pendleton Road, Palm Beach, home.

Firestone Divorce Trial Recessed By Judge Knott

FEB 1 1 1967

By FRANK MESSERSMITH
Staff Writer

Circuit Court Judge James R. Knott, after hearing testimony of six witnesses Friday in a courtroom closed most of the day to the press and the public, recessed the Firestone divorce trial until the week of March 13.

Shortly before the recess, Joseph Farish Jr., attorney for Mrs. Mary Alice Firestone, notified counsel for Russell A. Firestone Jr. that he anticipated it would take at least two or three more days of testimony to present his case.

Judge Knott ordered the courtroom emptied for the first time in three days of testimony when Dr. Edgar A. Kellerman, a psychiatrist who treated Mrs. Firestone in the fall of 1964 took the stand.

The courtroom remained closed all morning and into the afternoon when a second psychiatrist, Dr. William H. Everts, also testified.

The psychiatrists were allegedly questioned concerning Mrs. Firestone's mental competency in the period following a near-fatal car accident in 1964 in which she sustained severe head injuries.

During the noon recess, Firestone handed each member of the news media present a personally signed letter which stated, "There is absolutely no possibility of a reconciliation" between him and his estranged wife.

Firestone said, in the letter, that this was his answer to implications made in the last few days by his estranged wife and her attorney that a reconciliation was pending between the couple.

In conclusion, the letter stated, "Because I sincerely feel that she has not conducted herself during the course of our marriage in a manner befitting a faithful wife and mother, it is impossible for me to even contemplate a reconciliation and, therefore, the rumors are unfounded in truth."

The letter, Firestone said, was written by himself without consulting his attorneys. Firestone's attorneys appeared to be surprised when they read a copy of the letter presented to them by a member of the press.

The trial was re-opened to the press and public to hear the testimony of the remaining afternoon witnesses called by Mrs. Firestone's attorney.

Russell A. Firestone Jr.'s mother and step-father, Mr. and Mrs. John Galbreath, were called to testify Friday.

They were questioned concerning their first introduction to Mrs. Firestone and also questioned concerning Firestone's alleged acquaintance with Mrs. Myrna Odell.

Mrs. Odell, in previous testimony, has been alleged to have been a close companion of Firestone within the last year.

A third physician, Dr. James Cooney, a neurosurgeon, also testified Friday concerning his treatment of Mrs. Firestone at Good Samaritan Hospital after she was injured in the car accident.

Dr. Cooney stated that Mrs. Firestone had received fractures of the skull and shoulder blade in the accident.

He also testified that after an injury such as the long-haired, attractive brunette had received, a person frequently will be mentally unstable for a period of months.

Psychiatric care had been recommended several times for Mrs. Firestone after she had been released from the hospital, the doctor stated.

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IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR PALM BEACH COUNTY
CASE NO. 68 C 977-SMITH

MARY ALICE FIRESTONE,

Plaintiff,

vs.

TIME, INC., etc.,

Defendant.

Order

This cause was presented on Plaintiff's Motion to Limit Testimony. The Court heard this motion, and considered other matters until it became necessary to terminate the hearing. It is thereupon,

ORDERED AND ADJUDGED as follows:

1. That Plaintiff's claim for damage to reputation is allowed to be withdrawn. Any reference thereto in the pleadings is stricken and the fact that such claim has been withdrawn, or was ever made shall not be referred to in any way.

2. Plaintiff's request that examination of jurors be made in chambers is denied.

3. That this case does not fall within the holding of Times v. Sullivan. Counsel for both parties stipulated before the Court that this was solely a question of law to be ruled upon by the Court.

4. Arguments in support of or against objections during trial will not be made except on allowance of Court out of the presence of the jury.

5. Final Judgment in the Plaintiff's divorce action will be admitted in its entirety.

DONE AND ORDERED this 13th day of July 1970.

/s/ CULVER SMITH
Circuit Judge

[1] IN THE
FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE No. 68 C 977 Smith

MARY ALICE FIRESTONE, *Plaintiff,*

vs.

TIME, INC., et cetera, *Defendant.*

OFFICIAL COURT REPORTER'S COMPLETE TRANSCRIPT OF PROCEEDINGS AND TESTIMONY BEFORE THE COURT AND A JURY

APPEARANCES:

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Attorneys for Plaintiff

By: ROBERT M. MONTGOMERY, JR., ESQ. and
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FRATES, FAY, FLOYD & PEARSON
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By: WILLIAM S. FRATES, ESQ. and
LARRY S. STEWART, ESQ.

and

CRAVATH, SWAINE & MOORE
1 Chase Manhattan Plaza
New York City, New York

By: HAROLD R. MEDINA, JR., ESQ.
Attorneys for Defendant

[2] Be It Remembered the following proceedings were had and testimony adduced before the Honorable Culver Smith, one of the Judges of the above-styled Court, and a jury, duly empanelled and sworn, in the County Courthouse, in the City of West Palm Beach, County of Palm Beach, State of Florida, beginning at the hour of 9:30 o'clock a.m., on Monday, July 13, 1970, with appearances as above-noted, to-wit:

The Court: As your names are called, please come forward and have a seat in the jury box.

(Whereupon, the jury panel was selected to try the issues in this case.)

* * *

Mr. Frates: Your Honor, we accept the jury.
The Court: Both sides accept the jury?
Mr. Montgomery: Yes, Your Honor.
The Court: Swear them, please.

(Whereupon, the selected jury panel was sworn to try the issues in this case.)

The Court: Gentlemen, I think at this time I will take a few minutes recess before we [3] start. We will take about, I guess I will have to take about a twenty minute recess. Those who are in the jury box will retire to the jury room when we recess, that's the door right in here. All others, ladies and gentlemen, remaining in the jury panel, we have selected our jury for this first case. The rest of you are excused until Thursday morning at 9:30, 9:30, Thursday morning. Please be in the Courtroom at that time.

All right. Mr. Bailiff, we will take about a twenty minute recess.

(Whereupon, a recess was taken.)

Mr. Montgomery: Your Honor, we would like to invoke the rule.

The Court: Do each of you gentlemen have all your witnesses that are now present in the Courtroom, or do you have some?

Mr. Frates: Yes, we have five here, Your Honor.

The Court: Will all persons who are to be witnesses in this case please stand? How about yours, Mr. Montgomery?

Mr. Montgomery: Your Honor, I don't have any witnesses in the Courtroom. I would be [4] delighted to name them off for the record.

The Court: They are not here to instruct?

Mr. Montgomery: No, sir, but we will take the responsibility of instructing our witnesses in accordance with Your Honor's instruction.

The Court: You have some coming this afternoon?

Mr. Montgomery: Yes, sir, we will start putting on witnesses at 1:00 o'clock or after 1:00 o'clock, whatever time is convenient.

The Court: Let me instruct the witnesses. You will have to remain out of the Courtroom and only come in when you are called to testify. The Court instructs you that you are not to discuss your testimony with each other, in other words, no witness should talk with the other about his or her testimony or the testimony.

However, you may, it's proper for the lawyers to confer with you on either side. Other than that, you should not talk with anybody about your testimony.

Mr. Montgomery: Your Honor, could I have the names of these people, because I don't know them?

[5] The Court: All right. Do you have their names?

Mr. Montgomery: Except Mr. Delaney, I know him.

Mr. Frates: Mr. Daniels, Mr. Doerner, Mrs. Ursula Nadasdy.

The Court: All right. If you people then will remain right outside the Courtroom, right outside, and we will call you as soon as we can.

Gentlemen, you want to make a brief opening statement, each side?

Mr. Montgomery: Yes, if the Court please.

The Court: Do you wish to, Mr. Frates?

Mr. Frates: Yes, Your Honor.

The Court: Let me say one thing. I know there's no exact line of demarcation. I always request that counsel, as much as possible, confine it just to a statement of what you expect to prove or what you expect the evidence to show, without argument if you can. It's a little difficult.

Mr. Frates: Your Honor, from the voir dire I would think that counsel is going to argue in the opening statement and I am delighted Your Honor has instructed him not to.

The Court: Usually he doesn't. Now, I realize [6] that I can't order you not to say anything, we fully expect you to find a verdict for us.

Mr. Frates: I don't mean that.

The Court: There are little arguments that creep in. Ordinarily Mr. Montgomery doesn't argue, he says what he thinks the evidence is going to prove. You can state your claim, he claims so and so and you think the evidence will prove.

Mr. Montgomery: I have got my notes here if he would like to take a look at them.

Mr. Frates: I thought he did a pretty good job trying to argue on voir dire.

The Court: Gentlemen, it's not fatal either way.

Mr. Montgomery: I will do my best.

The Court: I am sure both of you will. Call the jury, please.

(Whereupon, the jury returned to the Courtroom and the following proceedings were had in their presence and hearing.)

The Court: Have a seat, please. Ladies and gentlemen, at this time counsel will make [7] an opening statement.

Mr. Samyn: Your Honor, in sitting in there I just recalled something. Two years ago a group of us from Boynton Beach applied for a radio station with FCC in Washington. We were denied the application, the license. We are appealing it now and it completely slipped my mind.

Mr. Montgomery: It's all right with me, that wouldn't effect you in your——

Mr. Samyn: I thought I better bring it out.

Mr. Frates: Appreciate it, him bringing it out, that's perfectly all right with us.

The Court: The Court thanks you for bringing it out. I don't think that would effect you in this case one way or the other.

Mr. Montgomery.

[8] OPENING STATEMENT OF PLAINTIFF

Mr. Montgomery: May it please the Court, ladies and gentlemen of the jury, this will be known as an opening statement. It's more or less like a preview of what we expect the testimony to be in this particular case, and it's designed to hopefully help you in order to follow the evidence.

Sometimes witnesses are taken out of turn and of course the defense will be putting on some witnesses, we think.

But briefly, the case is this. Shortly before Christmas in 1967, the defendant, we will show, published a false and defamatory article concerning the plaintiff, Mrs. Firestone. Now, this article simply stated was in a portion of Time magazine, Page 77, called Milestones, which is notable births, deaths, divorces and things of that nature.

The Court: Excuse me for interrupting. There is one thing I didn't ask counsel to do, and please keep an eye, since you each have associates here, to keep an eye when [9] people come into the Courtroom to make sure it isn't one of your witnesses. So if you gentlemen that are at the table will do that, I would appreciate it.

Mr. D'Aiuto: Thank you, Your Honor.

Mr. Montgomery: Now, under this particular magazine article it described the divorce between Mr. Russell Firestone and his wife, Mrs. Firestone, and briefly, because it will be coming in evidence, we think, this particular case is where Mrs. Firestone filed a suit, what we call for a separate maintenance. She did not want a divorce.

Her husband then counterclaimed for what we called extreme cruelty and adultery. After this case went on for, intermittently for almost seventeen months, then the Court finally entered its judgment and found that neither of the parties were domesticated and that the equities were, therefore were with the husband.

Now, in this particular case you will have a Court order, we will put the Court order into evidence, that is, let you see [10] what the Judge

found in their particular divorce case. This judgment, or decree, or what the Court found, came out on December the 15th of 1967. In truth and in fact, the Court did not find Mrs. Firestone guilty of adultery.

You will find from the evidence that Mrs. Firestone has lived in Palm Beach County since the ninth grade. She was married to Mr. Russell Firestone in 1961, her first marriage, his third. You will find from the evidence that this was a lengthy trial and you will further find from the evidence based upon the testimony of the Judge himself, we will call Judge Knott in the morning, that he definitely did not find her guilty of adultery.

You will further find from the evidence that in this state and under our law, your law, that in the event a person is found guilty of adultery, then consequently, that is, a wife, then consequently no alimony can be awarded to that particular person.

Judge Knott not only ordered alimony of some $3,000 a month, some $750 child [11] support and gave her custody of their then four or five year old son, Mark.

Now, in this particular article that said the Judge found Mrs. Firestone guilty of adultery, the evidence is going to show that there were 3,590,800 subscribers to this particular magazine of December the 22nd, 1967. That magazine sold for fifty cents at that particular time, making the gross on that particular magazine to Time, Incorporated, over $1,700,000.

The evidence is further going to show that there were 92,898, 92,000 of this magazine to subscribers in Florida. The evidence is going to show that there

were over 6,000 subscribers in Palm Beach County, and in addition to that, in Florida there were over 10,000 that were bought at the news stands and there was an additional, approximately 1,440 here sold at the news stands in Palm Beach County, Florida.

The evidence is going to show that this article was widely disseminated in this particular case, almost one out of every fifty families in this nation got this [12] magazine.

Now, Mrs. Firestone, the evidence is going to show, when the article came out, called her attorney, Mr. Farish at the time, and pointed out that the article, and you will hear testimony from Mr. Farish, also testimony from my client, Mrs. Firestone.

As a result of that, the evidence is going to show that Mr. Farish, who was then her lawyer, wrote a letter on December the 26th, the day after Christmas, just a few days before Christmas in 1967 after this divorce was over, to Time magazine, demanding that they retract what he thought to be a mistake, thought to be no problem with it. That letter of December the 26th, 1967, we will show in the evidence, was never claimed by Time, Incorporated.

When the letter was returned unclaimed to Mr. Farish who was then representing Mrs. Firestone, Mr. Farish, on January the 16th of 1968 sent out another letter addressed to the President of Time, Incorporated. That particular letter was received by Time, [13] Incorporated, and we will put that into evidence. That letter demanded a retraction.

After waiting approximately three months for Time magazine to retract that statement and make a correction, then finally the only thing left to do, to

bring Time, Incorporated's attention to this matter was to file a suit and at, with the authority of Mrs. Firestone, a suit was filed, the evidence is going to show.

Now, at this time as I mentioned, Mrs. Firestone had her child with her, lived over in Palm Beach, and we will show that as a result of Time magazine's saying and publishing the fact that the husband got the grounds of adultery, got his divorce on the grounds of adultery and she was convicted by this Court, highest Court in our state by the way, of being an adulteress, it made Mrs. Firestone terribly upset.

We will show evidence to you from a number of witnesses, and we have cut them down. We will show evidence of the overwhelming, the emotional problem that she had as a result of this, especially in [14] light of her son, Mark, and just having custody of him. Now, as this case progressed toward where it is today, a deposition, that is, sworn testimony of a particular witness by the name of Mr. Delaney was taken.

Now, Mr. Delaney is what they call a stringer for Time magazine. He denies at this particular time that he was employed by them, which makes no difference under the law in this particular case, and that is a fact for you to determine whether he was employed, or an agent, or a servant of Time, Incorporated. But when this deposition was taken, one of the defenses in this particular matter was an alleged telephone conversation between Time, Incorporated, Mr. Delaney, the stringer, who was called upon by New York to check out these facts and Mr. Joe Farish.

This telephone call allegedly took place, and there was a phone call in fact that took place on December the 16th, 1967, between Delaney, the stringer, and Mr. Farish. In that conversation Mr. Delaney, [15] that is, Time, Incorporated's man, said that Mr. Farish told him that the Judge granted this decree and found Mrs. Firestone guilty of adultery and that was the grounds, when in fact and in truth, the Judge did not find that. And Mr. Farish denies that.

By reason of the fact then that Mr. Farish became a witness in order to contradict this particular person, he had to withdraw from this case in early June of this year and consequently our firm has taken it over to present it to you.

Now Mr. Farish, in that particular conversation also warned Time magazine, Time, Incorporated, who also owns Life, to be extremely careful and extremely accurate in its reporting of this particular divorce action. You'll see that letter come into evidence and you will see the surrounding nature of that particular situation as the evidence unfolds before you.

Now, when the case was filed we sent out what we call interrogatories, that is, [16] certain questions, and we asked Time, Incorporated, and these interrogatories were signed by the then president of Time magazine, Mr. James Linen. And Mr. James Linen said that he received all of the information pertaining to the fact that the Judge had found Mrs. Firestone guilty of adultery from an AP dispatch which he attached to the interrogatories which you will see.

They said they got this information, in addition, from the Miami Herald, which was attached to the

answers to interrogatories, and you will see, they said that they got this information from His Honor, Judge Knott, and we will have Judge Knott up there to testify that that's not true. And then they said they got this information finally from Mr. Farish, and you will hear from Mr. Farish that that's not true.

Now, once they got this letter of retraction, and you will find that the law of this particular state says that if you make any demand for a retraction, [17] consequently you have no suit for any punitive damages in this particular case. No agent or servant nor anyone from Time has ever contacted Mrs. Firestone or Mr. Farish, nor has ever made any effort to retract this particular article and correct it.

I hopefully think that you will hear from the defense these witnesses. A Mr. Richard Duncan, who was the chief of the Caribbean Bureau for Time magazine in Miami, Florida; a Mr. George Daniels, who was the senior editor employed in 1967 for the Milestones in this particular magazine; a Mr. William R. Doerner, who was the contributing editor so far as this magazine was concerned; a Mrs. Ursula Nadasdy, who was the person in charge of Time, Incorporated, in order to check the accuracy of this particular article.

And we'll show in order to satisfy your wonderment at this particular time as to why Time did this to Mrs. Firestone. We'll show that in December of 1966 during the divorce between Mrs. Firestone and her [18] husband, Russell Firestone, that there was an article on electronic eavesdropping done by Life magazine. That in that particular article, Mrs.—it was quoted by one of the persons giving this particular information to the Life reporter that Mrs.

Firestone had bought, or that one of his men had sold out to her that was working for her husband, had sold out to her, which was untrue.

Likewise we will show that so far as this Life article was concerned, that also in that case a demand for retraction was made, and nothing was ever done about it and subsequently a suit was filed which is still pending in the Federal Court here because of their failure to retract.

We think the evidence is going to show that Time, Incorporated, was mad, that Time, Incorporated, was reckless, that Time Incorporated, was malicious, that Time, Incorporated, never took the time to look at that particular decree, but they nevertheless published this defamatory [19] article so far as Mrs. Firestone is concerned.

There are many other unusual happenings, we think, that will be shown in evidence that will better satisfy you as to the maliciousness of this particular article.

Now, this magazine has assets of over $500,000,000. We think that after you hear this evidence and hear the law, which the Court will charge you, that you will accept that law and that you will render a verdict against Time, Incorporated, so that they will never do this again, and persons like them will never do this again, that they will fairly, accurately, truthfully report the matters that go on that are disseminated to we, the public.

We are happy to have the case in your hands, believe me. Thank you.

[20] Opening Statement of Defendant

By Mr. Frates:

May it please the Court, ladies and gentlemen. I think that it's appropriate, although you know it, that what you have just heard is not evidence in this case, this is lawyer talk and what I say is not evidence in this case because we have denied emphatically what he has just told you.

I am not going to attempt to make a final argument to you at this time, and I am going to be relatively short because I want you to hear the witnesses and see the documentary evidence and listen to the law, and then you decide who's right and who's wrong in this particular case under the law.

One other thing, ladies and gentlemen, Time, Inc., is here defending itself as a result of this, and it was a story about a sensational divorce case. And of necessity we will have to talk about some things involving the plaintiff in this case, and I hope you understand that we are trying to defend, and are defending [21] ourselves to show that the claim is completely wrong, that we personally stand here without any personal feelings one way or the other for Mary Alice Firestone.

We want to talk about the facts and the law. One thing that I would like for each one of you to bear in mind, there is no claim in this case by the plaintiff for injury to her reputation, no claim for injury to her reputation. A divorce proceeding before Judge Knott went on for some seventeen months. It was prominently displayed in the press, magazines, radio, TV.

Judge Knott issued a final judgment which will be in evidence in this case, dated the 15th of December, 1967. The evidence as reflected by the final judgment of Judge Knott, his decision, on the 15th of December, 1967, will relate that the defendant husband, Russell Firestone——

Mr. Montgomery: Excuse me, Your Honor. If he's reading from that decree, unless he [22] reads it all at this particular opening statement, we would particularly object.

Mr. Frates: Counsel—may I proceed, Your Honor?

The Court: They understand that this is argument. Now, he could put that aside and say something from his memory what it says, and I think it's all right. They will have the whole thing in evidence. I have already ruled that, so although I don't think it's necessary to read the thing, but——

Mr. Frates: Your Honor, I am not reading, I am paraphrasing. I am not intending to read it.

The Court: As he says, it's lawyer's talk and he wants to paraphrase it. That's all right, they understand.

Mr. Frates: Thank you, Your Honor.

Now, we go back to the final judgment, the order of Judge Knott. On December the 15th, '67, it will show that he said in there, husband defendant, Russell Firestone, counterclaimed for divorce on grounds of extreme cruelty and adultery. [23] Counterclaimed on the grounds of extreme cruelty and adultery.

To point it out there, that she had brought the suit for separate maintenance, which means support for herself. At the end of the document, and you'll see the final judgment in its entirety, Judge Knott

entered his order and adjudged that the equities in this cause are with the defendant, that's Russell Firestone, that defendant, and that's Russell Firestone, now, I'm paraphrasing this, counterclaimed, and we just read the counterclaim was for extreme cruelty and adultery, for divorce, be and the same is hereby granted, Russell's counterclaim is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.

The evidence will show that out of West Palm Beach, Associated Press report, which went to Time, Inc., and went to Time, and it will be introduced into evidence and it will show that it stated that Russell Firestone was granted a divorce [24] from his wife, Mary Alice Firestone, it said that he had accused her of adultery and extreme cruelty, and it goes on in some detail.

Now, the senior editor, one of the senior editors in Time, Mr. Daniels, who will testify, saw this Associated Press release and as has been said here, these are the Firestones. And he sent it to one of his writers to check it out. And in general terms, and they will testify, it's Mr. Bill Doerner, and Miss Ursula Nadasdy, who is one of the researchers, was assigned to it and they went back and got some of a file that they previously had on the Firestones, and then in their careful reporting, they called their Miami Bureau and asked them to check on the story.

And a Mr. Duncan was in charge of the bureau at that time and he called in or called a Mr. Bob Delaney, who is a stringer. A man who worked on a hourly basis when he sends in a story that is

accepted is a stringer for Time. Mr. Delaney had lived here in Palm Beach, West Palm Beach, and [25] knew Judge Knott, who was the Judge, and they asked to have certain things verified. And Mr. Delaney called around, this was a Saturday, the next day, the 15th was Friday, December the 16th was a Saturday. Called around and, trying to find out who the lawyers were, he first called Judge Knott to ask the Judge, to check the story, get the facts from him. The Judge was not at home and Mr. Delaney left a message with his neighbor.

He then called, Mr. Delaney, the same day, called Mr. Joe Farish who had been the attorney for Mrs. Firestone in the divorce case, and in the conversation Mr. Delaney said he asked him what are the technical grounds for divorce, are they extreme cruelty and adultery, and Mr. Farish said yes, the technical grounds are.

He called that information in, and this all went into the compilation, the careful checking of the story.

Judge Knott, there was some very interesting language in the final judgment which you will see, and he sent some of [26] that, which was originally in the AP release, and he checked that to make sure that the quotes were accurate. And Judge Knott called him back later that evening and he confirmed with Judge Knott the fact that these quotes were accurate and that this was a fair representation.

And after three people that, who you will see, who were top journalistic people, who don't know Mary Alice Firestone, and who were doing their very best to be good reporters in their strict sense, and checking out way beyond what normally would

happen in the process that Time goes through in checking these stories, will all be brought out.

And as a result of that, they ran the article in Milestones because it was a matter of interest, because as counsel said, the Firestones are the Firestones. And they said, divorced, Russell A. Firestone, forty-one, heir to the tire fortune, Mary Alice Sullivan Firestone, thirty-two, his third wife, one time Palm Beach school teacher, on grounds of [27] extreme cruelty and adultery. After six years of marriage, one son in West Palm Beach, Florida. The seventeen month intermittent trial produced enough testimony of extramarital adventures on both sides, said the Judge, to make Doctor Freud's hair curl.

And there is no question that that statement was in the final decree. We go back again to the final judgment and the words used are the words that are in the final judgment of Judge Knott. Russell Firestone was granted the divorce on his counterclaim. His counterclaim was for extreme cruelty and adultery. And I submit to you that there was no malice by Time magazine and its people that were trying to produce a story, check it, present it and write it in a very carefully and accurate manner.

That's what the facts are in this case. Thank you very much.

[28] Mr. Montgomery: May it please the Court, we would like at this time to introduce certain interrogatories and answers thereto, I think we could probably do it in——

Mr. D'Aiuto: I think we could do it in about fifteen minutes, Your Honor, if we could borrow the Court's file.

The Court: How many are there?

Mr. Montgomery: Yes, sir, there are approximately forty something, Your Honor. Hold the line for just a second, let me take a look.

The Court: The interrogatories are of who?

Mr. D'Aiuto: Propounded by the plaintiff to the president of Time, Inc., answered by the president of Time, Inc., under oath with Mr. Frates' firm signing as of counsel.

Mr. Montgomery: Your Honor, while we are waiting, do you have any objection to the Time magazine going in?

Mr. Frates: No objection to the magazine.

Mr. Montgomery: We would like to introduce Time magazine, December 22, 1967, in evidence.

The Clerk: Plaintiff's Number 1 in evidence.

(Thereupon, Plaintiff's Exhibit Number 1 was marked [29] and received into evidence.)

Mr. Frates: I think the Court has already ruled that this be admitted in its entirety——

Mr. Montgomery: I have a copy here that I think is fairly fair and accurate.

Mr. Frates: Is that a copy?

Mr. Montgomery: It's a Xeroxed copy. If you have got one that's clean——

Mr. Frates: Go ahead, we will check it. Sometimes they leave out pages.

The Court: That will be admitted.

The Clerk: The final judgment will be Plaintiff's Number 2 in evidence without objection.

(Thereupon, Plaintiff's Exhibit Number 2 was marked and received into evidence.)

Mr. Montgomery: Interrogatories are October 15, '68.

Mr. D'Aiuto: I have the original interrogatories. Would it be agreeable with counsel if we could read our copy of the questions rather than——

Mr. Frates: Perfectly all right, Mr. D'Aiuto, anything that will expedite the proceedings.

Mr. D'Aiuto: Would you read them and I will read [30] the answers to them?

Mr. Montgomery: All right.

The Court: I better explain to the jury, hadn't I, gentlemen, what this is?

Mr. D'Aiuto: Yes, Your Honor, appreciate that.

The Court: Mr. Frates, I should explain I believe to the jury what these are, shouldn't I?

Mr. Frates: Yes, sir.

The Court: The interrogatories are to the president of Time, is that it?

Mr. Frates: Yes, sir.

The Court: Ladies and gentlemen, what we are now going to do, under the rule a party can read the interrogatories, that is, the questions and answers made to an adverse party in the case, and these gentlemen will read questions which were propounded to the president of Time in writing and his answers in writing which were made under oath at that time, at the proper time.

Mr. Montgomery: Thank you, Judge.

Mr. D'Aiuto: Your Honor, I notice in looking at these originals, that there were two exhibits that were attached that are missing. This is in Answer 23, they attached the copy of [31] the Associated Press dispatch and the copy of the Exhibit Number 2, the Miami Herald article, and I do not find them.

Mr. Frates: They are in that file, I am sure both of those documents in other files, I don't know why, the file has been here in Palm Beach. I am sure those

two documents are available in other portions of the file.

The Court: They are probably available in the affidavits that the plaintiff——

Mr. Frates: That's right, we can substitute and make those part of them.

Mr. D'Aiuto: Could we find two appropriate, because I believe those will be very material to the answers.

The Court: Do you need them right now before you complete your questions and answers?

Mr. Montgomery: I would like to look at them.

The Court: These are the affidavits that were filed by the defendant which attach a lot of articles, I think they are probably in there. Suppose you look at them, gentlemen.

Mr. Montgomery: No, sir, I can tell you right now this is not it.

[32] I have a copy of the AP dispatch.

Mr. Frates: We have the original AP dispatch.

Mr. D'Aiuto: Why don't we have an original of the AP dispatch and the original of the Miami Herald article of December 15, 16. You do not have a copy of the article?

Mr. Frates: We have several of them in the file so that's no problem. That's the AP, that's the original. We would like to offer it into evidence and make it part of the Court record, Your Honor, because this is the original document.

Mr. D'Aiuto: We have no objection, but I would like to ask one question, that underscoring and all that, who put all that on the document, was that done by representatives of Time, Inc.?

Mr. Frates: That's the original document out of the files.

The Court: As you got it?

Mr. Frates: As we received it and there's been depositions taken and I don't think I should comment on who did that, just confuse the issue.

The Court: It will be admitted without objection. [33] You don't object because it's out of turn?

Mr. D'Aiuto: No.

The Court: As Defendant's Exhibit 1.

The Clerk: Defendant's Exhibit 1 in evidence without objection.

(Thereupon, Defendant's Exhibit Number 1 was marked and received into evidence.)

Mr. D'Aiuto: Do you have a copy of that?

Mr. Frates: No, but I am sure in our files we have that, and I think on——

Mr. D'Aiuto: Mr. Delaney's——

Mr. Frates: Mr. Delaney's affidavit, there is a copy of it and take that.

The Court: Suppose you look for it now.

Mr. D'Aiuto: Would this be it right here?

Mr. Montgomery: I think so.

Mr. Frates: Let's see.

Mr. D'Aiuto: Miami Herald, December 16, 1967.

Mr. Montgomery: That's it.

Mr. Frates: That's one of them, look at the one on Delaney's.

Mr. D'Aiuto: This is attached to the affidavit.

Mr. Frates: That's the one.

Mr. D'Aiuto: Can we just remove this from the [34] file, Mr. Frates, by stipulation and——

Mr. Frates: Absolutely no objection.

The Court: All right. Mr. Clerk, make a note of it. Is this going to be a plaintiff's exhibit now?

Mr. Montgomery: Yes.

Mr. D'Aiuto: Yes.

Mr. Frates: We have no objection, we want to put it in too, but as long as the jury has it, doesn't make any difference.

The Court: As long as there is no objection, makes no difference who puts it in.

The Clerk: Plaintiff's Number 3 in evidence without objection.

(Thereupon, Plaintiff's Exhibit Number 3 was marked and received into evidence.)

Mr. D'Aiuto: Did you produce the originals, notice to produce the notice of the reported dispatch to Mr. Delaney dated December the 16th?

Mr. Frates: Yes, we have all the originals.

Mr. Montgomery: Any objection to that going into evidence?

Mr. Frates: No, we are going to put those in.

[35] The Court: There are three of you talking. There is nothing wrong with what you are doing, but there are three of you talking and this young lady is going to have an awful time keeping all of this straight, so if one of you could handle it with Mr. Frates, I don't care which one, so she will only have two people talking.

Mr. Frates: I don't mind both of them.

The Court: She has this problem, you understand.

I am just trying to keep a good record here.

Mr. Frates: What do you want to ask me?

Mr. D'Aiuto: Did you produce those originals——

Mr Frates: We have them here.

Mr. D'Aiuto: Do you have any objection to going ahead and putting them in also, the dispatches?

Mr. Frates: Let's name them as we want them.

Mr. D'Aiuto: One of December the 16th which he sent the information up, which you have related in your opening statement.

Mr. Frates: Yes.

Mr. D'Aiuto: May I see that? This is the original of Time file?

Mr. Frates: Yes, they are the originals from Time.

[36] Mr. D'Aiuto: All right, then, we will put this in as plaintiff's exhibit——

The Court: Next exhibit.

Mr. Frates: Plaintiff-defendant.

The Court: There is no objection, in other words, fine. It will be admitted.

The Clerk: Plaintiff's Number 4 in evidence without objection.

(Thereupon, Plaintiff's Exhibit Number 4 was marked and received into evidence.)

Mr. D'Aiuto: All right, Your Honor. I think that's all we need at the present time.

The Court: How many interrogatories are there?

Mr. D'Aiuto: There are approximately fifty-one and some of them have sub-paragraphs, so possibly it would be best to break for lunch.

The Court: Maybe break it for lunch since you have witnesses coming in early. Is that all right with the defendant?

Mr. Frates: Whatever Your Honor wishes to do.

The Court: I think probably we should at this time take a luncheon break and gentlemen I will have to, because of something that's [37] come up, I will have to recess until 1:15.

Mr. Montgomery: That's fine, Your Honor.

The Court: Ladies and gentlemen of the jury, at this time we will recess for lunch. You will be permitted to separate and do whatever you please during this period.

Now, I'll give you some instructions which are very important. In a recess or any time that you are released from this Courtroom or from the hearing of this trial, you must remember not to discuss the case with anyone or allow anyone to discuss it with you. Also, you must not discuss any facts or things that have taken place here among yourselves at this time.

See, it would not be proper to discuss the case among yourselves until you've heard all the evidence and my charge and you go back to render your decision. So when you are on recess together, just talk about other things, don't talk about the case because it's important that your mind be kept free from anyone else's comments or anything of that nature until you've heard all of the evidence and the charge of the [38] Court.

Also, and counsel mentioned this a little, please do not read any articles that may be in the newspaper during the progress of this trial and please do not listen to any news reports on it concerning it, if there are any, on radio or television. There may not be any, but there seems to be some interest, and there may be. So the Court is relying upon you to follow these instructions and if you do, you see

that makes it unnecessary to keep a jury locked up like you read about that's done in some places. We don't need to do that, to do it here, because we rely on the jurors, but we must rely on you for that.

Do not read any newspaper articles about it or listen to any television or radio broadcasts if there are any. Of course, after the case is over, then it's something else, but while it's going on, keep your mind free from anyone's thoughts or comments.

Please be in the jury room at 1:15, ladies and gentlemen, and we will recess until that time.

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[39] Afternoon Session (1:30 p.m.)

The Court: All right. Are you gentlemen ready to proceed?

Mr. Montgomery: Yes.

The Court: Is the defendant ready to proceed?

Mr. Frates: Yes, Your Honor.

The Court: Call the jury, please.

(Thereupon, the jury returned to the Courtroom after the noon recess and the following proceedings were had in their presence, to-wit:)

The Court: Gentlemen, are you ready?

Mr. Montgomery: Yes, Your Honor.

Mr. D'Aiuto: Yes, Your Honor. Has Your Honor already explained these are evidence in the case as opposed to just attorneys talking?

The Court: Yes, I have already explained to the jury what these interrogatories are, questions and answers given under oath.

(Thereupon, Mr. Montgomery and Mr. D'Aiuto, attorneys for the plaintiff, read from interrogatories to defendant and defendant's answer to [40] interrogatories, as follows, to-wit:)

Mr. Montgomery: (Reading) Interrogatories to Defendant. To James A. Linen, President of Time, Inc., Defendant, Rockefeller Center, New York, New York, and Messrs. Frates, Fay, Floyd and Pearson, 12th Floor, Concord Building, Miami, Florida, Attorneys for Defendant.

In accordance with the Florida Rules of Civil Procedure, you are hereby required, within twenty days after service hereof, to answer under oath and in writing the following interrogatories:

Q. Please state your name, address and the duties of your occupation.

A. James A. Linen, Rockefeller Center, New York, New York; President, Time, Incorporated.

Mr. D'Aiuto: Could we give the date those interrogatories were sent?

Mr. Montgomery: The date they were answered was August 23rd—they were sent August 23rd, 1968.

Mr. D'Aiuto: They were answered on the 16th day of October, 1968.

[41] Q. Interrogatory Number 2: How long have you been president of Time, Inc.?

A. Eight years.

Q. Three: Were you president of Time, Inc. on or about December 22, 1967? If not, state the name and address of said person.

A. Yes.

Q. What relation, if any, has Time, Inc., to the magazine or weekly periodical published under the name of Time?

A. Time, Incorporated, publishes Time, the weekly news magazine.

Q. Number 5: Are you familiar with the article appearing in Time under the date of December 22, 1967, under the column headed "Milestones" and reading, to-wit: Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a one time Palm Beach school teacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Florida. The seventeen month intermittent trial produced enough testimony of extramarital adventures on both sides, said the Judge, "to make Doctor Freud's hair curl".

A. Yes.

Q. Number 6: Did you edit or proofread or know of the facts contained therein prior to its publication?

[42] A. No.

Q. Number 7: State the name and address of the person and/or persons who wrote, edited, proofread, or had any knowledge as to the facts contained in said article prior to its publication.

A. George D. Daniels, Rockefeller Center, New York, New York; William R. Doerner, Rockefeller Center, New York, New York; Ursula Nadasdy, Rockefeller Center, New York, New York; Richard L. Duncan, 2101 South Bayshore Drive, Miami, Florida; Robert W. Delaney, Jr., 940 Northeast 147th Street, North Miami, Florida.

Q. Number 8(a): What was your source of the information appearing in Milestones of said publication relating to Mrs. Mary Alice Firestone?

A. Answer to (a), Associated Press dispatch; Miami Herald; Joseph D. Farish, Jr.; James R. Knott.

Q. (b) If said information was obtained through one of your reporters, employees, agents or servants, please state the name and address of said person and when said information was obtained and where.

A. (b) Persons mentioned in answer to interrogatory seven obtained the information from the sources mentioned to Interrogatory Number 8(a) during the early part of December, 1967.

Q. Interrogatory Number 9: Please state the name and [43] address of the persons present when your reporter obtained said information.

A. (a) None other than those set forth in answers to interrogatories seven and eight.

Q. (b) If the information was not obtained through your reporter, from whom was it obtained, listing their addresses, when, and where.

A. (b) Joseph D. Farish, Jr., 283 Cordova Road, West Palm Beach, Florida; James R. Knott, 3000 Washington Road, West Palm Beach, Florida.

Q. Interrogatory Number 10: Did any officer, agent, servant or employee of Time, Inc., contact Mary Alice Firestone prior to the publication of the article in question?

A. To (a), yes, through her attorney, Joseph D. Farish, Jr.

Q. (b) If your answer is in the affirmative, please state the names and addresses.

A. (b) Robert W. Delaney, Jr., 940 Northeast 147th Street, North Miami, Florida.

Q. (c) State the time, place, persons present and the substance of each such conference.

A. (c) On December 16, 1967, Delaney placed a telephone call to the said Joseph D. Farish, Jr., in West Palm Beach, Florida.

[44] Q. Interrogatory Number 11: Were the contents of the article ever discussed by any officer, agent, employee

or servant of Time, Inc., with Judge James R. Knott prior to its publication on December 22, 1967?

A. Yes.

Q. Number 14: Please state the number of Time magazines published under date of December 22, 1967, for mailing direct to your subscribers.

A. 3,590,800.

Q. (b) In the State of Florida.

A. (b) 92,898.

Q. (c) In Palm Beach County, Florida.

A. (c) There is no breakdown of circulation figures for Palm Beach County for the issue of December 22, 1967. However, the 1967 issue for which circulation was analyzed by county was March 22, 1967, and 6,232 copies of that issue were mailed to subscribers in Palm Beach County.

Q. Number 15: Please state the number of Time magazines published under the date of December 22, 1967, which were sold from the news and periodical stands throughout the United States.

A. (a) 10,447.

Q. In the State of Florida.

[45] Mr. D'Aiuto: Excuse me.

Mr. Montgomery: That was in the United States, that was under sub-paragraph (a) of Number 15, in the State of Florida.

A. (b) See answer to Interrogatory 14 (c), which I previously read.

Q. (b) In Palm Beach County, Florida.

A. (b) See answer to Interrogatory 14 (c). For the March 22, 1967, issue, there were 1,447 magazines sold on news stands in Palm Beach County.

Q. Interrogatory Number 17: Were you given an opportunity to retract said article?

A. Seventeen. A letter dated January 16, 1968, was received from the law firm of Farish and Farish; it contained the following quotations: "Mrs. Firestone alleges that a portion of the above quoted, to-wit, 'Divorced. By Russell A. Firestone, Jr., heir to the tire fortune; Mary Alice Firestone, 32, his third wife; a one time Palm Beach school teacher; on the grounds of extreme cruelty and adultery,' is false, malicious and defamatory." It was received on or about January 19, 1968.

Q. Interrogatory Number 18: Did you retract said article in a later publication of Time magazine?

[46] A. No.

Q. Interrogatory Number 20: State the name and address of each person, firm, corporation or other entity that has furnished information to you concerning the contents of the publication which is the basis of this litigation.

A. 20: Associated Press; Joseph D. Farish, Jr., Farish and Farish; James R. Knott.

Q. Number 22: Did you make any attempt to confirm or verify the information contained in said publication prior to same being published?

A. Yes.

Q. Number 23: If so, state, (a) name and address of each person contacted.

A. (a) Associated Press dispatch; Miami Herald; Joseph D. Farish, Jr.; James R. Knott.

Q. (b) The information obtained from each such person.

A. (b) Associated Press dispatch, (See attached Exhibit 1).

Mr. Montgomery: Exhibit 1 was the AP dispatch and I'd like to read that. It has been introduced in evidence as, I think, it was defendant's exhibit——

Mr. Frates: Your Honor, I think they ought to go ahead and read the interrogatories which [47] they have offered in evidence.

Mr. D'Aiuto: It refers to this exhibit as being attached and at this point it becomes relevant and material.

Mr. Frates: They are reading interrogatories and I don't think that is that important.

The Court: He wants to read this, so I believe he has the right to, if he wishes to.

Mr. Frates: I withdraw.

The Court: Go ahead, Mr. D'Aiuto.

Mr. D'Aiuto: Firestone divorce, two-fifty, West Palm Beach, Florida, AP—Millionaire industrial heir Russell A. Firestone, Jr., was granted a divorce Friday from his third wife, a former West Palm Beach school teacher he had accused of adultery and extreme cruelty. Circuit Court Judge James R. Knott in entering the decree awarded Mary Alice Firestone, 32, custody of the couple's five year old son, Mark, and ordered Firestone to make monthly payments of $3,000 for alimony and $750 for child support. Mrs. Firestone, who filed a suit for separate maintenance prior to the divorce action initiated by [48] Firestone had sought monthly payments of $8,700. They were married August 1, 1961, in New York City. Their suits indicated the couple separated in October, 1964. In his decree Judge Knott said he was "inclined to discount much of the testimony presented in support of the divorce action." According to certain testimony in behalf of the defendant Firestone, extramarital escapades of the plaintiff, Mrs. Firestone, were bizarre and of an amatory nature which would have made Doctor Freud's hair

curl. Other testimony in plaintiff's behalf would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr, Judge Knott said. The decree ended a stormy and scandal-ridden divorce battle that broke open during their 1966 trial. More than one hundred witnesses were summoned for the trial, including nobility, police, private detectives and socialites. Judge Knott also awarded Mrs. Firestone the couple's home in Palm Beach, but denied her request to retain ownership of race horses, [49] furniture and insurance benefits from a stolen ring valued at $220,000. Then some gibberish. EJ, 652, PS, December 15.

A. (b) Miami Herald, (See attached Exhibit 2.)

The Court: Can't we give it to the jury? I am only thinking of time.

Mr. D'Aiuto: Maybe I can just read the pertinent portions with respect to——

Mr. Frates: Oh, no, sir.

The Court: I will require you to read all of it.

Mr. D'Aiuto: I respectfully submit we read it all because I believe it comes within the answers to interrogatories.

The Court: You feel you should have it in at this point?

Mr. D'Aiuto: It is a part.

Mr. Montgomery: Your Honor, the reason is that Time magazine in this interrogatory stated it was from these two places that they received this information and that it the reason that we want to.

Mr. Frates: That is not accurate, Mr. Montgomery.

[50] The Court: Excuse me a minute. I think under the rules, I was trying to save some time, but if they wish to read it, I think they are entitled to.

Mr. Frates: I have no objection.

The Court: I think if you read it you must read it all. Otherwise you select what you think is most important. You can argue the part that is important, but not in the thing itself, so it is the ruling of the Court that you may read it now if you wish, but you must read it all.

Mr. Montgomery: Thank you, sir.

The Court: Go ahead.

Mr. D'Aiuto: The Miami Herald, Saturday, December 16, 1967. Firestone granted divorce. She vows fight. By Mona Morris, Herald Staff Writer. West Palm Beach. Rubber fortune heir Russell A. Firestone, Jr., and wife Mary Alice were never domesticated, a Circuit Court Judge decided in an order Friday ending their six year marriage. Firestone, 41, was granted the divorce he sought after Mrs. Firestone, 32, sued for separate maintenance, but he will [51] have to pay $3,000 a month alimony. Judge James R. Knott cited a Florida Supreme Court ruling which described domestication as essential to a successful marriage. According to certain testimony in behalf of the defendant, Russell, extramarital escapades of the plaintiff, Mary Alice, were bizarre and of an amatory nature which would have made Doctor Freud's hair curl. Other testimony in the plaintiff's behalf would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr, Judge Knott wrote in the final judgment.

The Judge added that he discounted much of the testimony as unreliable. In the present case it is

abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication and that the marriage should be dissolved, Judge Knott ruled.

The case was originally filed more than two years ago. Testimony was given in Court sometimes in closed door sessions [52] in a series of hearings over a seventeen month period. Mrs. Firestone, at the Palm Beach home she will keep under the terms of the divorce, vowed that she will appeal the decision. She fought for separate maintenance instead of a divorce. Her attorney, Joseph D. Farish, Jr., was granted $50,000 fee, to be paid by Firestone, but Mrs. Firestone was happy on one point. The Court granted her custody of their son, Mark Alan, who is almost five. That is the most important thing to me, the raven haired, petite, former school teacher said. She will get $750 a month for child support in addition to the $3,000 a month alimony. That totals less than the amount she spent each month on clothes when she and Russell were living together, according to trial testimony. It was her first marriage and Russell's third. Among the things Mary Alice wanted but didn't get in the suit were $8,375 a month allowance, $184,000 in insurance proceeds from the 1962 theft of a twenty-seven carat diamond ring, [53] eight racing horses, and $23,000 to pay back debts. She will, however, get the Penelope place house with the remaining mortgage payments to be paid by her ex-husband.

Financial testimony by the defendant portrayed Russell as a poor little rich boy with a yearly income of a half million dollars, but it is tied up in debts of 1.4 million, alimony to one ex-wife, support of three children of former marriages and clauses in various trust funds, his lawyers claimed.

The family fortunes stem from Russell's grandfather, industrialist Harvey S. Firestone. Russell's mother, now Mrs. John Galbraith, owned among other things the Darby Dan Farms racing stables. During the months' long Court proceedings, Mary Alice maintained she favored reconciliation. Russell testified that he didn't. Judge Knott granted custody of young Mark Alan to Mrs. Firestone, saying the evidence showed she has shown affection for him and devoted time and attention to his care. [54] He also granted Firestone reasonable visitation rights.

The next source, Joseph D. Farish, Jr., said that the technical grounds for divorce were extreme cruelty and adultery. James R. Knott confirmed that the informaton previously telephoned by Delaney to Time's New York office was accurate.

Q. Whether you contacted plaintiff or her agents to ascertain the facts concerning the alleged information that you had obtainced from others.

A. (c) Yes.

Q. If you contend that the publication which is the basis of the litigation is true, then in this regard please state, (a), the name or other means of identification and address of each person from whom you received any information on which you relied in making the publication concerning plaintiff.

A. To Number 24 (a) (b) and (d), answered by the answers to Interrogatories 23, (a) (b) and (c).

Number 23 (a), (b) and (c) which I just read just for interest of shortening it up, were the Associated Press dispatch, the Miami Herald article, Joseph D. Farish, Jr., and James R. Knott.

[55] Mr. Frates: Your Honor, I don't want to object. but I don't think——

The Court: I will sustain the objection. You shouldn't go back. That is argument. You are making an explanation which you can give in closing argument.

Q. In Number 25, as to any writing or document on which you rely, state the name or the other means of identification of the author.

A. Associated Press dispatch was received on December 15, 1967. The Miami Herald article appeared early Saturday morning, December 16, 1967. The telephone conversation with Joseph D. Farish, Jr., occurred prior to 1:25, p.m., December 16, 1967. The conversation with James R. Knott took place in the evening of December 16, 1967.

Q. (b) The date it was published. You read those.

A. (a), (b) and (d) are answered by the answers to Interrogatories 23 (a), (b) and (c).

Q. (c) was the address of each private writing, and (d), the name of the periodical, magazine or other media in which any public communication was printed.

Interrogatory Number 26: Did you obtain any information——

A. Is that Number 25?

[56] Q. Yes, that was 25.

The Court: Is there an answer?

Mr. D'Aiuto: I thought you were still reading Number 24. Number 25, would you read that over again?

Q. As to any writing or document on which you rely, state the name or other means of identification of the author.

A. (a) Not applicable.

Q. (b) The date it was published.

A. (b) Not applicable.

Q. (c) The address of each private writing.

A. (c) Not applicable.

Q. (d) The name of the periodical, magazine, or other media in which any public communication was printed.

A. (d) This involves the AP dispatch and the Miami Herald article noted in answers to interrogatories Number 23 (a), (b) and (c) and Number 24 (a), (b), (c) and (d).

Q. Number 26: Did you obtain any information on which you relied in making the publication concerning plaintiff from any public records?

A. Number 26, yes, indirectly.

Q. Number 27: If so, state, (a), the Governmental agency that maintains the records.

[57] A. (a) Clerk of the Fifteenth Circuit Court in and for Palm Beach County, Florida.

Q. (b) The address of the office in which the records are maintained.

A. (b) Palm Beach County Courthouse, West Palm Beach, Florida.

Q. (c) The description by date, subject or filing number of the records consulted.

A. (c) Decision of James R. Knott, Circuit Judge, Case Number 64 C 2790 C, filed in the Minutes of the Circuit Court Number 136 at Pages 313 through 319.

Q. Number 29: If you contend that any of the matters contained in said publication were privileged, state, (a) whether the statements were made in response to requests for such information, and if so, one——

Mr. Frates: You left one out, Mr. Montgomery.

Mr. Montgomery: I meant to delete that.

Mr. Frates: I think you have to announce which ones you are going to delete.

The Court: I'm sorry, I don't have this to follow. Let me see this.

Mr. Montgomery: I deleted Number 28. I just didn't want to read it.

The Court: Just one person at a time.

Mr. Frates: I think, Your Honor, if it is part [58] and parcel of the answers—I don't think it is a complete answer unless that one is read. Number 27 (d) is the one that he left out.

The Court: 27 (d)?

Mr. Frates: 27 (d).

The Court: The one which was left out——

Mr. Montgomery: Your Honor, I will read it.

The Court: Go ahead and read it. That is probably best. Just read it all.

Q. If you contend that any of the matters contained in said publication were privileged, state (a),—I beg your pardon.

Number 27 (d): The facts contained in those records on which you relied in making the publication concerning plaintiff.

A. (d) That Mr. Firestone had charged his wife with extreme cruelty and adultery; that he won the divorce and that the Court found that the equities were with him. Further that the Judge indicated he was inclined to discount much but not all of the testimony concerning plaintiff's extramarital escapades.

Q. Number 28: Objection sustained.

Mr. Frates: The objection is sustained.

[59] The one you just read was the one that you skipped over, is that correct?

Mr. Montgomery: Yes.

The Court: I understand Interrogatory Number 28, there was an objection when it was propounded and the Court sustained the objection?

Mr. D'Aiuto: That's right, Your Honor.

The Court: Then we will not read that one.

Mr. D'Aiuto: I was going to delete Number 29 too.

The Court: Will you look at 29 and see if you want that read?

Mr. Frates: I think they should all be.

The Court: All right. Number 30, was the objection sustained on that?

Mr. D'Aiuto: No.

Q. What facts do you rely on in support of your denial that plaintiff has been damaged as a result—excuse me. Under that Interrogatory Number 30, I think that has been withdrawn, has it not?

The Court: I don't know. Let me see the file. You say it was withdrawn?

Mr. Montgomery: No, sir. I wanted to withdraw it.

[60] Mr. Frates: That is all right.

The Court: All right.

Mr. Frates: If it is all right with Your Honor, it is all right with us. We don't think it is material at all.

Q. Interrogatory Number 31: Did you receive permission from any person to publish the contents of the article in question?

A. Number 31: Only that implicite in the information received from plaintiff's attorney, Joseph D. Farish, Jr.

Q. Number 32: If so, state the name and address of each person from whom you received such permission.

A. 32: Except as answered in the answer to interrogatory Number 31, not applicable.

Q. (b) The name and address of any person from whom you requested such permission.

Mr. D'Aiuto: That is the only answer they gave.

Q. (c) Whether you requested the permission from the plaintiff or her agents.

(d) The time and place of such permission being granted, and the substance of each of same, whether in writing or verbal.

Skipping to Interrogatory Number 37: Have any surveys been taken by you, any advertising agency or [61] other source to determine the number of readers in the State of Florida or Palm Beach County, Florida?

A. 37: Yes.

Q. If so, Number 38: If so, for each survey state, (a), the name and address of each such person, firm or organization that conducted the survey.

A. 38 (a): Audit bureau of circulation, 123 North Wacker Drive, Chicago, Illinois, 60606. W. R. Simmons and Associates, Inc., 235 East 42nd Street, New York, New York.

Q. (b) The number of readers estimated to have read said publication of December 22, 1967.

A. (b) W. R. Simmons and Associates, Inc., estimates that Time had 496,056 readers in Florida and 36,549 readers in Palm Beach County.

Q. Number 39: Did you receive notice from plaintiff that she considered the material contained in the publication defamatory as to her?

A. 39: Only insofar as it was indicated in the letter from Farish and Farish on January 16, 1968, referred to in the answer to interrogatory Number 17 above.

Q. 40: If so, state the date you received the notice.

A. 40 (a): On or about January 19, 1968.

Q. (b) Whether the notice was written or oral .

A. (b) Written.

[62] Q. 41: Did you receive any notice from anyone else that certain material contained in the publication was libelous as to the person giving such notice?

A. 41: No.

Q. Skipping Number 42, 43, 44. If you did receive notice from plaintiff or others concerning libelous material contained in the publication, state, (a), what action you or any of your agents, servants or representatives took to prevent further publications.

A. 44 (a): No action was taken to prevent further publications.

Q. (b) The name and address of each officer or executive of your company that took such action.

A. (b) Not applicable.

Q. (c) Whether you allowed the publication to be republished since the notice received and if so, state the circulation of each such publication and where circulated.

A. (c) I had no power to allow re-publications or not.

Q. Number 51: If defendant is a separate corporation, then state the following: (a) The valuation of the assets, breaking same down into real estate, personal property and intangibles.

Mr. Montgomery: Your Honor, we have the annual report of the company that was given by [63] letter from Mr. Stewart. At this time we'd like to introduce certain portions of that in lieu of the answer to interrogatories.

Mr. Frates: Your Honor, to protect the record we don't want to argue. We object to this because we don't think it is applicable. There is no evidence

which warrants the introduction of this at this time. I didn't want to object. I don't want to lengthen the argument.

The Court: This is true. Of course there isn't any evidence at this time, so I will at this moment sustain an objection to it with the right to offer it later. I think the objection at this point is well taken.

Mr. Montgomery: We will offer it at a later time.

That ends the answers to interrogatories.

The Court: All right. Thank you, gentlemen.

Mr. D'Aiuto: Your Honor, at this time we would like to read the plaintiff's exhibit, I believe it is plaintiff and defendant's Exhibit Number 4, which is Bob Delaney's dispatch was has been admitted in evidence.

Mr. Frates: I have no objection to it, but you [64] said plaintiff's and defendant's?

Mr. D'Aiuto: Plaintiff's Number 4.

Mr. Frates: I want the record to be clear on that.

The Court: Fine. Go ahead and read it.

Mr. D'Aiuto: Plaintiff's Exhibit Number 4, telephone. 3214 Record 13, December 16, 1967. 1:25 p.m. From Bob Delaney, Miami, to Applegate. For, Milestones. Firestone divorce. The name of Firestone is spelled Russell A. Firestone, Jr. He was 41 years old sometime in July. His wife is named Mary Alice and she just had her 32nd birthday a week or two ago. They were married in New York City August 1, 1961. Their son, whose name is Mark, was born January 31, 1963. I have double checked the alimony at Duncan's request and it is to be $3,000 a month for her plus $750 a month for

child support. She has been given custody of Mark, their son. The technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery. The Judge, however, [65] in quite a colorful opinion said that neither of them "has shown the least susceptibility to domestication and that the marriage should be dissolved." Judge Knott said she (Mary Alice) urges that her marriage be preserved in order to protect guileless womankind from defendant's roving marriage tendency. As phrased by her counsel, he should not be allowed to "hop from wife to wife while leaving a child here and there along the way."

The Judge also said, "It might be argued with equal plausability that the present marriage should be preserved for defendant's own protection from predatory females whose amorous instincts seemingly are instantly aroused to fever pitch by the charm of his wealth."

The Court: Let me have the file, please.

Ladies and gentlemen of the jury, with reference to exhibits, for your information some may be read to you and some may be shown to you during the course of the trial, but they will all go back [66] with you to the jury room when you retire to consider your verdict, so you will then have ample opportunity to study them.

Mr. D'Aiuto: Your Honor, we call Joseph D. Farish, Jr.

Mr. Frates: Your Honor, we wanted to take a matter up before Mr. Farish testified.

The Court: All right. I will excuse the jury for a moment.

Mr. Frates: All right, sir.

The Court: Ladies and gentlemen of the jury, I am going to have to excuse you just for a short few minutes. If you will retire to the jury room while I pass on this.

(Thereupon, the jury retired from the Courtroom and the following proceedings were had in their absence, to-wit:)

Mr. Frates: Your Honor, Time, Inc., moves the Court not to permit Mr. Farish to testify on the grounds that he is still counsel of record in this case. It affirmatively shows from his deposition that he was handling this matter on a contingency fee basis. He refused to answer the questions [67] about the costs, but his testimony shows without contradiction by a statement of Mr. Montgomery, and I am reading from Page 9 now: "I have an assignment of all right, title and interest. Mr. Farish will be paid as a result of the work he has put in in this particular case. In the event there is any recovery—", and that is about the size of that.

Now I submit, Your Honor, that the whole reason for not permitting counsel of record to participate, not just in the trial, but in the litigation, is so that under no circumstances will it appear, and we are talking about an ethical consideration, that will appear that counsel's testimony would have any appearance of self gain. We have statements from them clearly showing that he has a financial fee interest in the outcome of this case. I submit, Your Honor, whether he sits here as counsel and lets someone else try it or what he does, he has a financial interest as an attorney at law in the outcome of this law suit and therefore I submit, Your Honor, [68] he should be permitted to testify under the cases which we have previously cited to Your Honor.

Mr. Montgomery: Mr. Farish, go out so you won't hear what I have to say, so you can corroborate what I say when you come in.

The Court: That's right. He shouldn't hear this argument. That's right.

Mr. Frates: I don't suppose you two have talked about it. You don't have to ask him to go out as far as I am concerned.

The Court: Well, I think he should be out.

Mr. Montgomery: Your Honor, what I meant by that is, when I took the file over, it was going to be necessary for Mr. Farish to take some time with me so far as witnesses, like any other expert witness, and that is all that I meant and that is what I told him I would do and that is what I meant, it was a bad word, but he has no financial interest in the outcome of this case whatsoever, so the whole contract has been assigned to me, so with the exception of course of the—and all the costs have been paid in this particular case before I took [69] this particular case over and his fee, he has other cases with him and that is it.

Mr. Frates: Counsel, I have no reason to dispute your word in any sense and I don't intend to. All I know is what you have said representing your counsel, Mr. Farish. Also, the costs have been paid. Who have they been paid by? They have been paid by Mr. Farish and Mr. Farish is going to get them back if they recover. He is going to get his costs back and he is sitting here. He has an interest in the outcome of this case.

The Court: Here was the statement; Mr. Farish will be paid as a result of work he has put in in this particular case in the event there is any recovery. In other words, on quantum meruit basis.

Mr. Montgomery: No, I have this contract. This is my contract. That is the only way, so he would not have—he absolutely has no interest in this particular case whatsoever, but I did tell Mr. Farish that in the event I did take his time because I had to confer with him because I didn't know [70] anything about it after the assignment and for the time that he takes here, that I would pay him like I would any other expert in the event he was out of pocket, or anything of that nature.

I regret, Your Honor, that I used that particular term, but I have an assignment of this, I have a contract and he has, to my knowledge, no interest. He is not going to get any of my fee. I will tell you that.

Mr. Frates: No, he is just going to get his share of the fee, as you said, in the event there is any recovery. That is about the size of it.

Mr. Montgomery: You can ask Mr. Farish if you want to, he is outside.

The Court: Just a moment, one at a time. It will be one at a time or there won't be a trial.

Mr. Frates: I can't make it any clearer than Mr. Montgomery made it, and the whole deposition was taken on that basis. They refused to show any of the records and that is immaterial. Here is a statement [71] that he voluntarily made and it is just as clear as a bell. I will sit down and not make any other comments.

Mr. Montgomery: The only thing is that even if he did have an interest in it, it would not disqualify him from testifying in this particular case, which he does not.

The Court: Well, here's the thing. There is a question of that. Now of course he is like any other witness to begin with. He always has a right to

question the witness on the stand, but his interest in the case, either previously or now or in the future. That cross examination can be had. Now, the only thing about it is this statement here. Well, of course Mr. Farish is a witness and——

Mr. Frates: Your Honor, here is a counsel who succeeded him.

The Court: I understand. Did you mean by this that he will be paid for his work subsequent to the time you took it over?

Mr. Montgomery: Just what I requested him to do, Your Honor. I had four thousand pages of transcript that I waded through that I [72] asked him about, and it saved me a great deal of time. I had, as you know, a number of appeals. I had the Life case to do and I had to find out about these witnesses and what he had done. I took some of his time subsequent to this particular assignment and I haven't gotten a bill from him.

Mr. Frates: You then say you are going to pay him if you recover? Even taking that——

Mr. Montgomery: I might, I am not obliged to.

Mr. Frates: Even taking what you are saying now, you are still going to pay him? Is it contingent on whether he gets paid attorney's fees out of what happens in this case?

The Court: Like a doctor taking it on a basis——

Mr. Frates: That's right.

The Court: Well, I think this, I think, Mr. Frates, I am going to overrule the objection. All this goes to his credibility and whether he has an interest in the case and I have heard lawyers ask a doctor, "Do you have a contingent in this case?" And they always say no and sometimes I wonder. I

think I will overrule the objection, but everyone understands what you can do on cross [73] examination.

Mr. Montgomery: There is one thing, Your Honor, while the jury is out. There is a contingent fee contract that was assigned to me and what it was I don't think has any place in this particular file whatsoever unless there is some—in other words, the amount of the fee has nothing to do with this particular case.

The Court: Not if he has no further interest.

Mr. Frates: Your Honor, I think I would certainly have a right to ask this witness to produce the records to show whether or not he has an interest in the outcome of this case, and particularly, Your Honor, where we have this premise where his counsel or Mr. Montgomery said he had.

Now again I will deal in the abstract, an attorney can sit up there and say, "I have no interest," but I believe we have a right to see what documents are available, either Mr. Montgomery's or his, to find out whether there is, because certainly this jury has a right to know that. If he has a substantial interest in the outcome of [74] this case, the jury has a right to know that in evaluating his testimony.

The Court: I think so too, but we are going to ask him, I imagine. Now of course whether the gentleman is going to tell the truth or not, I mean that is what you are talking about, really.

Mr. Frates: There are documents, he has admitted that, both of them admitted there are documents.

Mr. Montgomery: I have every document in my file that Mr. Farish had. I took this case completely, every paper, everything, so——

Mr. Frates: How about the costs?

Mr. Montgomery: There were no costs. I have incurred costs since I took it over, but I owe no costs, no costs are owed as far as from what Mr. Farish tells me.

Mr. Frates: Who paid them?

Mr. Montgomery: Mrs. Firestone.

Mr. Frates: Well, I think we have a right to ask where the checks are, who paid for it, and I hope you don't take it personally, if I say on this point there is some dispute. [75] Is that a pretty good word?

Mr. Montgomery: Fine.

The Court: All right.

Mr. Montgomery: I have an assignment and it is my contract.

The Court: I think I will overrule the objection at this point and of course now both of you understand that counsel here is entitled to question him on any of this.

Mr. Montgomery: Yes, sir, but as far as the amount of the contract that he had with Mrs. Firestone that he assigned to me, I do not think so.

The Court: No, but he can question him about any payments received previously or anything coming to him now.

Mr. Montgomery: In fact, I don't know anything about that, except of course what I was told.

The Court: I wouldn't at this time, unless something else develops, allow you to ask him about the contract which is now Mr. Montgomery's contract, except about any payments previously made to him on his fees on the costs or whether he spent the costs, [76] what is coming to him in the future and further cross examination like that, and does he represent her in other matters, and all that.

Mr. Frates: I would certainly have no objection to asking then to produce all documents they have and let Your Honor look at them. I don't want to see them in particular, but I think we have a right to look at them and see if Your Honor determines whether or not——

The Court: I don't think Mr. Montgomery would have any objection to me personally, and no one else, looking at them, to see if there is an assignment. I would not be able to pass on whether it is a valid assignment or whether there is a consideration.

Mr. Montgomery: It was just something, when this particular thing came up, I got the—I gave you a copy of Mr. Farish's, a deposition.

The Court: Here is an assignment.

Mr. Montgomery: I think it was on July 12th, a Friday.

[77] Mr. Frates: There was some reference to it, yes, sir, there is some reference to it. That is just an assignment of a contingency fee contract.

The Court: Correct. On that part there is no dispute.

Mr. Frates: That's right. Never get around to what is the contract and who has it and who gets paid out of it, if you get anything.

The Court: You can sure ask him about it.

Mr. Frates: Could we have a two minute recess, Your Honor, while the jury is out?

The Court: Sure. We need a little more than that.

Mr. Frates: No, that is fine.

Mr. Montgomery: I have the contract here. Would you like to see the contract?

Mr. D'Aiuto: I would be glad to show you the contract.

The Court: I wouldn't mind seeing it.

Mr. D'Aiuto: We have about that much file at the office, including the contracts.

The Court: We will take about a fifteen minute recess.

Mr. Montgomery: Do you want me to get that [78] contract for you?

Mr. D'Aiuto: I will bring it and show it to the Judge.

Mr. Frates: Bring the costs in to, will you?

Mr. Montgomery: No.

The Court: We will take five minutes.

(Thereupon, a short recess was taken.)

The Court: Are you ready to proceed?

Mr. D'Aiuto: Yes, Your Honor.

The Court: Gentlemen, let me ask that only one of you handle each witness. Now different ones can handle different witnesses, but it makes it difficult for both of you to object or both of you to argue, so in each instance of a witness or in each instance of any argument or objection, just one of you speak so it will be much easier.

Mr. D'Aiuto: Our problem is, we have never tried a law suit together. We have practiced ten years together and never tried a case together.

The Court: You can alternate or change any way you wish, but that makes it easier.

Call the jury, please.

[79] (Thereupon, the jury returned to the Courtroom and the following proceedings were had in their presence and hearing, to-wit:)

The Court: All right. Call Mr. Farish.

Mr. D'Aiuto: Mr. Farish.

Thereupon, JOSEPH D. FARISH, JR., called as a witness for and in behalf of the plaintiff, after being by the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

Direct Examination by Mr. D'Aiuto:

Q. State your full name for the record, please.
A. Joseph D. Farish, Jr.
Q. Where do you live, sir?
A. 6717 South Flagler, West Palm Beach, Florida.
Q. How long have you lived here in Palm Beach County?
A. Since 1925, about forty-five years.
Q. Are you married?
A. Yes, sir.
Q. Do you have children?
A. Yes.
[80] Q. And, Mr. Farish, you are an attorney at law, is that correct?
A. Yes, sir, I am.
Q. And you maintain offices here in West Palm Beach?
A. Yes, sir, 316 1st Street, West Palm Beach.
Q. How long have you practiced law, sir?
A. I am in my twenty-fourth year.
Q. Would you give us a brief background of your education, leading up to your Llb. degree?
A. I attended all the public schools here in Palm Beach County. Graduated from Palm Beach High School. The University of Florida, Bachelor's Degree, and Doctor of Jurisprudence at the University of Florida Law School.
Q. What year were you admitted to practice?
A. January, 1947, I believe.
Q. During the course of your practice did you have occasion to represent Mrs. Mary Alice Firestone?

A. Yes, sir, I did.
Q. What was your first representation with her with respect to being her attorney?
A. Mrs. Firestone first engaged me as her attorney to represent her in a pending marital match here in the Circuit Court of Palm Beach County, Florida.
Q. This was a divorce where actually a separate [81] maintenance suit was instituted by her against her husband, Russell Firestone, and——

Mr. Frates: Excuse me, counsel. I object to the leading.

The Court: Objection sustained.

Mr. D'Aiuto: Withdraw it.

By Mr. D'Aiuto:

Q. Would you tell the jury what you did for her in that connection?
A. Well, at that time there was another attorney in the case and she was seeking a separate maintenance for herself and custody of her child and alimony unconnected with divorce. And her husband, Russell Firestone, filed a counterclaim seeking a divorce.
Q. Do you still represent Mrs. Firestone in connection with that domestic matter?
A. I do.
Q. Do you also represent Mrs. Firestone in connection with another law suit other than that particular divorce case?
A. Yes, sir. I do represent her in a pending action for libel against Time, Inc., as a result of a publication in Life magazine.
Q. Where is that case pending?
A. It is now pending in the United States District Court, [82] Southern District of Florida.

Q. Were you also attorney of record in this particular libel case?

A. Yes, sir, I was up until recently.

Q. When you say recently, could you tell the jury what transpired that required you to withdraw?

A. Well, sir, it came to my attention that my testimony in this case was more material and for the best interests of the client than my acting as an attorney and I felt that the best interests of the clients, my client, Mrs. Firestone, and justice, that I withdraw from the case and I withdrew from the case.

Q. You have formally withdrawn and the Judge has released you as attorney, is that correct?

A. Yes, sir.

Q. Mr. Farish, in connection with your interest in the outcome of this law suit, do you have a financial interest in this particular law suit?

A. I have absolutely no financial interest in this law suit, only in the interest of justice.

Q. Mr. Farish, with respect to your representation of Mrs. Firestone, could you tell the jury when the final judgment was entered by Judge Knott in the divorce action?

[83] Mr. Frates: Your Honor, I object to any reference to the final judgment. It is in evidence. I don't know whether you actually put it in evidence, but marked it.

The Court: It is in evidence.

Mr. Frates: The date and everything is there, and I don't think there should be any discussion on this final judgment. It speaks for itself.

Mr. D'Aiuto: The date that he learned of it, Your Honor, is very important insofar as the relevancy to Mr. Delaney.

The Court: I didn't hear that that was your question.

Mr. Frates: I have no objection to that question, the date you heard it.

The Court: If that is what you intend, rephrase the question.

By Mr. D'Aiuto:

Q. When did you first learn of the final judgment that was entered in the divorce case, Mr. Farish?

A. It came to my attention when Judge Knott's secretary called me on a Friday afternoon, December the 15th, 1967, and asked did I want to pick it up or should she mail it, and I said no, I would certainly like to [84] see it, and I sent a secretary over to pick it up.

Q. So you received the divorce decree or judgment on the 15th, is that correct?

A. Yes, sir.

Q. Now after that judgment had been entered and you read it, did you receive a phone call from any representative of Time, Inc.?

A. Yes, sir. This was on a Friday afternoon that the judgment was entered, and Saturday the attorney's offices are closed as well as the Courthouse and I was at my home and I did receive a call from a reporter from Time magazine.

Q. And do you recall approximately what time of day that you received this call from this reporter?

A. Yes, sir. It was between 12:00 and 1:00, to the best of my recollection, at my home.

Q. At your home. Did he identify himself?

A. Yes, he did.

Q. What was his name?

A. He identified himself as Mr. Bob Delaney, as a reporter for Time magazine and I of course knew Bob, I had known him for a number of years and I recognized his voice.

Q. How did you happen to know him for a number of years? Where had you seen him?

[85] A. Well, sir, I had previously—right after World War II, I was twice elected Municipal Judge of the City of West Palm Beach, and I served in that capacity and I knew Bob as a reporter in my Court and also here in the Courthouse and later on after he was identified with one of the local radio stations and later on he had gone to Tallahassee and I had known him, seen him around the Supreme Court in Tallahassee and in the Capital, and we were casual acquaintances.

Q. Did you recognize his voice when he called you and identified himself?

A. Oh, yes, I had heard him on the phone previously and I had heard him on the air and I think I had even seen him on television in Tallahassee.

Q. What did he want, Mr. Farish?

A. He identified himself and inquired if I was the attorney for Mrs. Firestone and I said yes, I was, and he said that he had heard that a final judgment of divorce had been entered by the Court, and I said yes, it had, and he asked some questions about that.

Q. Did he inquire as to what the grounds of the Judge's granting the divorce were?

A. Yes, sir, he did, but before getting to that he inquired and I told him about the sequence of the [86] pleadings, that is, that she had filed a suit for separate maintenance.

Mr. Frates: Your Honor, that is not responsive to the question asked by counsel.

Mr. D'Aiuto: I will withdraw it and restate it.

The Court: All right.

By Mr. D'Aiuto:

Q. Mr. Farish——

The Court: Excuse me. To get it straight, there was nothing wrong with your question, but the answer is not responsive, so I sustain the objection. Now, ask him another question.

Mr. D'Aiuto: The only one that should complain about the non responsive answer should be the one who asks the question.

Mr. Frates: For the record, I will be quiet.

The Court: I sustained your objection, Mr. Frates.

By Mr. D'Aiuto:

Q. Would you relate to the Jury what you told Mr. Delaney in response to his inquiry?

A. Yes, sir, I will. I related to Mr. Delaney the sequence of the pleadings that had been cast by the various parties leading up to the final judgment, to-wit, that Mrs. Firestone had filed a complaint for [87] separate maintenance, seeking support for herself and her minor child and the custody of her minor child, unconnected with divorce. However, Mr. Russell Firestone, he desired a divorce and he had filed for a divorce, and the Court had granted a divorce.

Q. Did you advise Mr. Delaney at that time what the grounds were that the Judge granted the divorce on?

A. I advised him as to—he asked me what were the grounds in the complaint, that is, what was accused, Mrs. Firestone was accused of, and I said Mr. Firestone had accused her of extreme cruelty and adultery. However, the Court had granted the divorce on what the Court had said was lack of——

Mr. Frates: Your Honor, again I object. He is relating a conversation. I withdraw the objection.

The Court: I think this is all right, Mr. Frates. All right, sir.

By Mr. D'Aiuto:

Q. You may proceed.

A. As I was trying to say, the Court had granted the divorce on the grounds of lack of domesticity, that they were not suitable for marriage and it was on that basis that the Court had granted the divorce [88] to Mr. Firestone and had awarded Mrs. Firestone a sum of money. I told him, he asked me what it was, $3,000 a month alimony and $750 a month child support, and had granted to her custody of her child.

Q. Mr. Farish, being an attorney, you practiced for some twenty-four years, are you familiar with the laws of the State of Florida with respect to whether an adulteress wife is entitled to alimony under the law?

Mr. Frates: I object.

The Court: Don't answer.

Mr. Frates: I object.

The Court: Objection sustained. That is a matter for the Court to charge, I think, if it is proper. That is a matter of law.

Mr. D'Aiuto: May I request the Court to take judicial notice of the statute?

The Court: I have to take judicial notice of state statutes, so it either will or will not be a charge, depending on what we determine. If it is proper, there will be a charge. I will sustain the objection.

By Mr. D'Aiuto:

Q. Mr. Farish, in this conversation with Mr. Delaney, [89] did you have occasion to talk to him at all about the other libel suit or give him any cautionary instructions with regard to his reporting what you just told him?

Mr. Frates: Your Honor, I don't want to jump up and down, but here is counsel just leading him under two lawyers and I seriously think they would know how to ask the proper question, and I object.

The Court: Objection sustained. That is a leading question.

By Mr. D'Aiuto:

Q. Mr. Farish, would you tell the ladies and gentlemen of the jury whether you had any further conversation with Mr. Delaney and if so, please relate what the additional conversation was with this gentleman.

A. I advised him that the divorce had been granted because he had asked about that. He also asked about, I believe, how old little Mark was and I believe he asked where Mrs. Firestone was living, and her approximate age and also I had advised him the grounds that the divorce had been alleged, and that she had been found not guilty of adultery and I further told him that—we had a few pleasantries in between in the conversation about where he was—I [90] said, "Bob," I said, "I am sure you are aware of it because Time, Inc. is your employer. They publish not only the Time magazine, but the Life magazine and I want to advise you that I have pending at the present time in the Federal Court, an action against your employer, Time, Inc., for a libelous and false publication that this Life magazine had published about Mrs. Firestone in the May 20th issue, 1966, so be careful of what you report because I already have one action against your organization now."

That was towards the end of the conversation.

Q. Did he respond to that, Mr. Farish?

A. He gave me some flip answer, I don't recall what it was.

Q. When did you next hear anything about this conversation or anything about Time magazine after this conversation with Mr. Delaney?

A. Well, sir, I next heard from Mrs. Firestone, my client. She called me in a very emotional state advising me and telling me something about an article in Time magazine under Milestones or something like that.

Q. And had you read the article that she was referring to at that time?

[91] A. No, sir. I don't take the magazine and I had not been aware of it at the time that she called me. I tried to calm her and told her that I would have to get a copy of it and investigate it and see what we could do about it. I was sure it must be some mistake.

Q. Could you characterize for the jury how she sounded over the telephone when she reported this particular matter to you?

A. Highly emotional and upset and in a distraught state, I would say.

Q. What did you advise her after she reported this to you?

A. I advised her that I would secure a copy as soon as possible and try to see if we can get it straightened out. I tried to reassure her that certainly there must be some mistake.

Mr. Frates: Your Honor. Go ahead. I will withdraw it.

The Court: Go ahead, Mr. Farish.

The Witness: They had accused her in a magazine of having been found guilty of adultery by a final judgment and I am sure it must be a mistake and we will try to get it straightened out.

By Mr. D'Aiuto:

[92] Q. Following that conversation with Mrs. Firestone, what did you do? Let me withdraw that.

Do you recall just when you received this phone call?

A. Well, sir, it would have to be the issue after. I later determined it was the issue of December 22nd, 1967, so it would be at or about that date or maybe before, if she had seen it. I just can't remember. It was about that date. Sometime before Christmas. I tried to reassure her that after a nice Christmas with Mark and tried to—we will try to see what we can do after the holidays.

Q. Now, what did you do then? Did you obtain a copy of the magazine?

A. Yes, I did. I secured a copy.

Q. After you secured a copy of it, what did you do?

A. Well, I could hardly believe it, but I caused a letter to be written to the president of the corporation that publishes this magazine.

Q. What date did you cause this letter to be sent to the president of the magazine?

A. It was a day or so after Christmas, sir.

Q. How did you send that particular letter to Time magazine? Did you send it through the regular United States mails or just how did you send it?

[93] A. I sent it through the United States mail, registered, deliver to addressee only, return receipt requested, attention Mr. James A. Linen, President, Time, Inc.

Q. Did you personally dictate the letter, or was this sent out by one of your associates?

A. It was done by one of my associates because I thought that this would be straightened out as soon as it was brought to their attention.

Q. When did you next see that particular letter? Was it received by the president, or what happened to it?

A. No, sir, it was returned unclaimed.

Q. Did it have a date as to the date it was returned to you on that return receipt?

A. The last date I see is January 19, 1968, so it was at about that time, along in there.

Q. Mr. Farish, did you, when you received that back or prior thereto, cause another letter to be sent to Time magazine?

A. Yes, sir, I did.

Q. And what date did you send that second letter to Time?

A. The return receipt was returned before the letter came out and I caused another letter to be sent out on January 16, 1968, when the receipt came back. The receipt actually came back unclaimed before the [94] letter.

Q. All right. Did you receive a return receipt on the second letter that you caused to be sent to the magazine?

A. Yes, sir, that was received. It shows here on 1-19-68.

Q. Are these the two letters, or copies of the two letters, with return receipts that you received that were sent to Time magazine?

A. Yes, sir. They are identically the same letters.

Mr. D'Aiuto: I'd like to offer these two letters in evidence, Mr. Frates.

Mr. Frates: Your Honor, we don't think they are material or relevant. I wonder if they could be marked for identification so we don't have to argue about them now. You are not going to use them now?

The Court: You think they are immaterial?

Mr. Frates: Yes, sir. I don't want to send the jury out and take up time right now. If we can mark them.

The Court: We can mark them if it is satisfactory with you and argue about it when we get the chance. Is that what you mean?

Mr. Frates: Yes. Are you going to use it now?

[95] Mr. D'Aiuto: I'd like to have you say they are irrelevant and immaterial. Perhaps the relevancy or materiality will have to be developed further by the testimony of this witness and I am not about to excuse him without having heard what his grounds are.

The Court: I see what you mean. You don't want to excuse him before we decide?

Mr. D'Aiuto: That's right.

The Court: Do you need to have it decided before you question him further?

Mr. D'Aiuto: No.

The Court: Let's have them marked.

Mr. Frates: His testimony would have nothing to do with the relevancy or ground.

The Court: We will mark them for identification right now.

(Thereupon, the documents referred to were marked Plaintiff's Exhibits A and B for identification only.)

By Mr. D'Aiuto:

Q. Mr. Farish, with respect to those two letters that you caused to be sent to Time magazine, did you ever receive a response thereto from Time magazine?

[96] A. None, sir.

Q. After you failed to receive a response, what did you do?

A. Well, when I was sure that they got the mail, the second letter, the aspects of the whole situation took on

a much more serious status. Mrs. Firestone's emotional state, and I considered instituting litigation, which I ultimately did.

Q. Did you have occasion during that period to see Mrs. Firestone and discuss that matter with her?

A. I did, numerous times.

Q. Would you relate to the jury her manner or her interest or state with respect to this particular refusal?

A. Yes, sir. She was very much upset over this publication. At times she would be in tears, would show that she was worried a great deal about it. She was especially concerned about it and its effect upon her child, Mark.

Q. Mr. Farish, when was it that you instituted suit then on her behalf with respect to Time, Inc., on the Time magazine article?

A. Sir, I can't remember the date it was filed. I just don't recall.

Q. It was sometime subsequent to the failure of Time to [97] respond to your letter of January 16th?

A. Oh, yes, when I saw that no response was forthcoming to my inquiry.

Q. After you caused that complaint to be filed, did you obtain service upon the defendant?

A. Yes, sir, they were served by proper channels.

Q. And did they ultimately allege an answer with respect to denying the allegations and et cetera?

A. Oh, yes, they filed a very vigorous defense with lawyers in Florida and New York.

Q. And was one of those defenses a denial that any demand for retraction had ever been made?

Mr. Frates: I can't tell which one is the lawyer and I object to this and I think Mr. Farish's testimony is not answering the question. He is arguing the case.

The Court: I am going to sustain the objection. You are asking him about things that are a matter of record in the case.

Mr. D'Aiuto: Your Honor, this is going to the relevancy objection he had to those letters that I previously offered. He indicated they are irrelevant and immaterial and the only relevance and materiality they would have would be to——

[98] The Court: You asked Mr. Farish if they filed an answer denying these things and he said yes. There wasn't any objection to that, but then when you go on to discuss the validity of the answer, that is something else.

Mr. Frates: New York and Miami and Florida lawyers.

The Court: We know you gentlemen are all here.

By Mr. D'Aiuto:

Q. Well, anyway, did you ever receive a response from Time magazine other than the response through their attorneys?

A. No.

Mr. D'Aiuto: I have no further questions, Your Honor.

Cross Examination by Mr. Frates:

Q. Mr. Farish, you told the jury that in your discussion with Mr. Delaney, you said she was found not guilty of adultery. I wrote that down. Did I get it correct? You told him she was found not guilty of adultery?

A. That was my testimony.

Q. That is your testimony. Mr. Farish, I hand you [99] Plaintiff's Exhibit 2, the final decree of divorce, which you are familiar with?

A. Yes, sir. Your firm was on the other side of the case, sir.

Q. That's right. You took an appeal, didn't you, Mr. Farish, after, from that order?

A. I did, sir.

Q. Now does it say specifically, not your interpretation, Mr. Farish, but does it say in there she was found not guilty of adultery?

Mr. D'Aiuto: Objection, Your Honor. That document speaks for itself. I believe the question came up before.

Mr. Frates: This is cross examination.

The Court: State your objection.

Mr. D'Aiuto: Object on the grounds the document speaks for itself with respect to what the findings were. It speaks for itself. I did not go into the findings in respect that.

The Court: Mr. Frates, you proceeded there by saying, "Mr. Farish, not your interpretation," but he has testified this is his interpretation. Now the document will speak for itself, and you can argue it.

[100] Mr. Frates: Yes, Your Honor, but he told the jury that as a result of Mr. Delaney's conversation, he told him she was found not guilty of adultery.

The Court: That's correct. Now he says he told him that. All right.

Mr. Frates: I asked him to show this jury in that final judgment where it says any such thing.

The Court: I will sustain the objection. You are going to show it in your closing argument.

Mr. Frates: All right, sir.

The Court: Both sides are going to argue that.

Mr. Frates: Thank you, Judge.

By Mr. Frates:

Q. Mr. Farish, in the first paragraph of the final judgment, which is Plaintiff's Exhibit 2 there, I think, what was Russell Firestone's answer and counterclaim for?

Mr. D'Aiuto: Excuse me, Your Honor. I am going to have to object. This is improper cross examination. The document speaks for itself. He was not interrogated with respect to the final decree as to reading [101] paragraphs. I object to counsel cross examining him on various paragraphs.

The Court: I thought you objected to them reading something.

Mr. Frates: No, sir. He went into this. He discussed what it was and he goes on and gives his interpretation of what it was and I think as to what he told Delaney, Your Honor, I am not pointing this out as to what the facts were, but what he told Delaney.

The Court: Yes, but he has testified when he told Delaney. Now you asked him what appears in here.

Mr. Frates: That's right, Your Honor, because it is our contention——

Mr. D'Aiuto: Your Honor, excuse me. If we are going to argue the contentions, which is arguing for the jury, I am going to object. I believe the Court has previously ruled.

The Court: I think I will overrule the objection as to this particular question and see, because the jury has already—it has been several times. Go ahead and answer this and let's see what it is [102] leading to.

By Mr. Frates:

Q. Mr. Farish, let me ask you this, Mr. Russell Firestone filed a counterclaim for divorce, correct, in the law suit, the Firestone law suit, is that correct?

A. Yes, sir, that's correct, sir.

Q. And Mrs. Firestone, who was your client, had filed for separate maintenance, is that correct?

A. That's correct.

Q. And the grounds in the counterclaim that Mr. Firestone filed, on the grounds of extreme cruelty and adultery, correct?

A. That is correct, sir. That is recited right in the first paragraph of the final judgment.

Q. All right, sir. Now was that the only counterclaim that Mr. Firestone filed?

A. That is the only affirmative relief he sought, was the divorce.

Q. All right, sir. On the grounds of extreme cruelty and adultery, right?

A. Precisely.

Q. Now referring to Page 6, Judge Knott found the defendant's counterclaim, and that is Russell Firestone, for divorce, "Be and the same is hereby granted." Correct?

[103] A. Which line are you on?

Q. I am reading Number 1.

A. Yes, I am following you.

Q. "Equities in this cause are with the defendant, Russell Firestone." I am reading for Russell Firestone, "that defendant's counterclaim for divorce be, and the same is hereby granted." Correct?

A. Yes, sir.

Q. Mr. Farish, there is no question that Mr. Delaney, as a stringer for Time, called you and was trying to find out from you information concerning this story? In other

words, he was investigating, trying to find out what the facts were from you?

A. That is what he represented himself to be doing, sir.

Q. Well, he called you, didn't he?

A. Yes, sir, he called me.

Q. He initiated the call and this was on a Saturday?

A. Certainly.

Q. All right, sir. Isn't it true, Mr. Farish, that the term "technical grounds" was used in your conversation with him?

A. I was asked that question previously, counsel, as you are aware. I am not quite sure whether I or he used those terms, those words, but it is possible, that the technical grounds for divorce as alleged in the [104] complaint were adultery and extreme cruelty, but I did not tell him that the divorce was granted on adultery.

Mr. Frates: No further questions.

The Court: Anything else, Mr. D'Aiuto?

Mr. D'Aiuto: Yes.

Redirect Examination by Mr. D'Aiuto:

Q. Mr. Farish, would you refer to the top of Page 2 which was omitted from the cross examination, where it begins, "Nevertheless", and please read that to the jury, sir.

The Court: The jury can read it, but if you want to read it to them, you can read it. This is an exhibit and the lawyer has a right to read the exhibits that have been admitted to the jury, if you wish, but you don't need to ask him this. It is there, you can read it yourself.

Mr. D'Aiuto: I will read it.

The Court: Read whatever portion you want to.

Mr. D'Aiuto: "Nevertheless, it is the conclusion and finding of the Court that neither party is domesticated, within the meaning of that term as used by the Supreme [105] Court of Florida in the case of Chesnut versus Chesnut," et cetera.

The Court: All right, sir.

By Mr. D'Aiuto:

Q. Mr. Farish, would you explain to the jury what a finding by a Judge is and what it means in legal effect, sir?

Mr. Frates: Your Honor, I again object. This is a matter of law, what a finding of a Judge is. This is a final judgment as Your Honor has ruled on it. It is a matter of law for Your Honor to interpret.

The Court: I think so. Objection sustained.

By Mr. D'Aiuto:

Q. Mr. Farish——

The Court: I think everyone pretty well knows what a final judgment is.

By Mr. D'Aiuto:

Q. Is there, anywhere in this final judgment a finding by Judge Knott that Mrs. Firestone was guilty of the charge of adultery?

Mr. Frates: Your Honor——

The Court: I think—you object?

Mr. Frates: Yes, I object, Your Honor, as it speaks for itself. He said the counterclaim [106] for divorce on grounds of extreme cruelty and adultery was granted.

The Court: Let's don't go into it any further because you are objecting and I am going to sustain

the objection. I think this is a matter for the jury, they are going to read this, and it is a matter for counsel to argue what it says.

By Mr. D'Aiuto:

Q. Mr. Farish, when you talked to Mr. Delaney, did you give him permission to print that the grounds for divorce were granted on extreme cruelty and adultery?

A. Absolutely not, sir, because she was granted $3,000 per month alimony and an adultress wife cannot——

Mr. Frates: Excuse me.

The Court: Only answer the question, Mr. Farish.

The Witness: I am trying to, sir.

The Court: The answer is no.

The Witness: All right, sir, but it required an explanation, I thought.

The Court: No. That is another thing. Anything else?

Mr. Frates: No, sir.

Mr. D'Aiuto: No further questions.

(Witness excused.)

[107] Mr. Montgomery: Your Honor, at this time we respectfully request that Your Honor take judicial notice of the appropriate statute so far as it is in our divorce law and so tell the jury at this particular time pertaining to divorce and alimony, if the Court please. It is a matter that can be, during any case, that the Court take judicial notice of it and we respectfully request that this Court do it at this time, sir.

Mr. Frates: Your Honor, there is no ground for divorce in Florida on what they call domesticated.

The Court: Just a minute. You may be getting into another argument.

You asked that I advise the jury what the statute is concerning that?

Mr. Montgomery: Yes, sir.

The Court: Granting a divorce on the grounds——

Mr. Montgomery: Right, sir.

The Court: First, Mr. Frates, do you object to me doing this at this time?

Mr. Frates: Yes, sir, at this time.

The Court: I will sustain the objection at this [108] time. This does not mean I won't do it at the appropriate time.

Mr. Frates: No, sir.

The Court: At this time the Court feels that they are to be so advised, it is something for the Court to give them as an instruction on what the law is.

Mr. Montgomery: At the close of all the testimony rather than at this particular time?

The Court: Yes. That is why I sustained any objection at this time. That is without prejudice for you to ask for it. I am not ruling that I am not going to do it. I say, if I think I should do it, it should be in the instructions.

Mr. Montgomery: Thank you. Your Honor, so far as that is concerned, without me asking you to take judicial notice of the other Florida statutes, we have a number of them. Would they all be in a charge? I mean, shall I make a motion for you to take judicial notice of certain statutes here?

The Court: I think any statutes of the State of Florida, the law is, the Court takes [109] judicial notice. If they are state statutes, and I think it is

like any other case, you want me to charge them as to what the law, statutory law, is. You request instructions on that and then we decide.

Mr. Montgomery: Thank you, Your Honor.

The Court: You don't have to make a motion because if they are applicable, the law, the Court does charge the statutes that are properly applicable.

Mr. D'Aiuto: Your Honor, at this time I'd like to read the final judgment which has been entered into evidence.

The Court: All right. You have a right to. Are you going to read the one that was marked?

Mr. D'Aiuto: Plaintiff's Exhibit Number 2, Your Honor.

The Court: All right. Let's let somebody follow it, because sometimes when you read you make a wrong statement of words.

(Thereupon, there was a bench conference out of the hearing of the reporter.)

[110] Mr. D'Aiuto: (Reading) "In the Circuit Court of the Fifteenth Judicial Circuit of Florida. In Chancery. Case Number 64 C 2790 C. Mary Alice Firestone, plaintiff, versus Russell A. Firestone, Jr., defendant. Final Judgment.

This cause came on for final hearing before the Court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery, and the wife's answer thereto setting up certain affirmative defenses.

The testimony of numerous witnesses was submitted by the parties before the Court in both open

and closed sessions over a period of about seventeen months, with a record running into thousands of pages.

The parties were married on August 1, 1961, in New York, New York. One child, Mark, was born of the marriage on January 31, 1963, of whom each parent seeks custody. The parties lived together in Texas, [111] Illinois, New York and Palm Beach, Florida, until October, 1964, at which time they separated in Palm Beach, and have not lived together since. The plaintiff is thirty-two years of age and was a school teacher before her marriage to defendant, who is forty-one years of age. This is her first marriage and his third marriage.

According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Doctor Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr. The Court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the Court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida in the case of Chesnut versus Chesnut, 33, So. 2d, 730, where the Court, in holding that a [112] divorce rather than separate maintenance should be granted, said:

> 'The big trouble was total incapacity on the part of either for domestication. Seventy-five percent of successful marriage depends on tact to cushion and by-pass domestic frictions. It is much better than meeting them head-on and

> bearing the scars they leave. When the bride and the groom are both devoid of a yen for domestication, the marital bark puts out to sea with its jib pointed to the rocks. . . .
>
> We think the record reveals a complete allergy to the give and take essential to successful marriage.'

In the case of Spencer versus Spencer, Florida, 193 So. 2d, 40, the Court stated:

> 'We determine that the legal effect of the evidence was sufficient to prove the alleged grounds for divorce on behalf of the wife or the alleged grounds for annulment or divorce on the behalf of the husband. The explanation or rebuttal of each to the evidence of the other lacks substantial evidentiary value, and there is [113] no real conflict of specific fact. Neither party is domesticated, and the marriage should be dissolved. . . .
>
> The doctrine of recrimination should not be applied here. Its application is most applicable when a party seeks to take advantage of an act or omission which he himself induced. It may be invoked because of the nature of the wrong, either for the benefit of the Court and society or for the benefit of the defendant, when to do otherwise would be to allow one party to take an unfair advantage of the other party. Stewart versus Stewart, 1946, 158 Florida, 326, 29 So. 2d, 247, 170 A. L. R. 1073.'

In the present case, it is abundantly clear from the evidence of marital discord that neither of the

parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

Plaintiff strongly resists her husband's claim for divorce; looking beyond matters of crass financial nature, she urges that her marriage be preserved in order to protect guileless womankind from defendant's roving [114] marriage tendencies. As phrased by her counsel, he should not be allowed to 'hop from wife to wife while leaving a child here and there along the way.' It might be argued with equal plausability that the present marriage should be preserved for defendant's own protection from predatory females whose amorous instincts seemingly are instantly aroused to fever pitch by the charm of his wealth. It might readily be contended also that others, in the spirit of the day, have equal rights to share in the economic fruits of the more abundant life provided by defendant's marriage proclivities.

Such arguments, of course, have no relevancy or applicability here; this Court is neither a penal institute nor an instrument of social or economic reform, being concerned solely with the respective rights of the parties to the relief sought in the light of the evidence and the viability of the marriage relationship.

With a gross 1965 income from family trusts totaling $521,888.47, the defendant [115] may be considered a man of conspicuous wealth, although a maze of spendthrift restrictions, pledges, alienations and assignments for various purposes, among which are obligations for the support of three children by two previous wives and alimony for one of the latter; debts totaling approximately $1,400,000; individual business operations involving helicopters, air planes, race horses and real estate, and taxes

reaching the current 70 percent bracket overlying the whole, tend to rob the financial picture of much of its rosy hue.

The substantial residue remaining after initial deduction——".

I think I am going to skip this part. They can read that. That is all about financial matters.

The Court: If they want to.

Mr. D'Aiuto: If they want, they can read that.

The Court: He is going to skip parts of it.

Mr. Frates: Your Honor, I know it is long, but he started to read it and I think it has got to be read sometime, I think this is [116] as appropriate——

Mr. D'Aiuto: You may read whatever parts I omit.

Mr. Frates: I think you ought to read the whole thing.

The Court: I will grant your request.

Mr. Frates: It has to be done sometime.

The Court: Go ahead and read it all.

Mr. D'Aiuto: Could I have some water then?

The Court: Let Mr. Montgomery read it.

Mr. Montgomery: (Reading) "The substantial residue remaining after initial deductions by defendant's principle trustee, the Cleveland Trust Company, for certain major obligations is sent by the trustee to a firm of attorneys in West Palm Beach, who disburse the remainder under the supervision of the Cleveland Trust Company. According to the testimony of defendant's Florida accountant, his living expenses are calculated at $3,000 per month. Since defendant gave up polo in 1962, his expensive hobbies have been confined largely to speculative

business ventures. Much of the expense involved in the extravagant [117] mode of living adopted by the parties during the 38 months they lived together was due to an indulgence of plaintiff's tastes, which, according to her testimony included an average monthly expenditure of $5,000 for clothes and a $3,000 monthly allowance for spending money, covering such varied items as support for her mother and a press clipping service which she desires to continue. An economic analysis submitted by plaintiff indicates that in order to maintain the same level of material well-being for herself and her child, a sum between a minimum of $6,765 and a maximum of $15,144 per month will be required; based on this, plaintiff requests an allowance of $8,375 per month.

The minor child of the parties has been in the temporary custody of the plaintiff, and the evidence demonstrates that she has shown affection for him and devoted time and attention to his care. The Court finds that plaintiff is entitled to be awarded the custody of said minor child.

[118] During the marriage, defendant collected ——".

Your Honor, should I, even though it says defendant and plaintiff, should I put in the names? Do you think that would be better?

Mr. Frates: Fine with me. That is perfectly satisfactory, just call them Russell Firestone and Mary Alice Firestone.

Mr. Montgomery: (Reading) "During the marriage, Russell Firestone collected $184,400 in insurance proceeds as the result of the loss of a diamond ring being worn by his wife, taken from her in a robbery. Mrs. Firestone had bought——".

It should be, I am certain that this was a typographical error, would you not agree?

Mr. Frates: Go ahead and read it.

Mr. Montgomery: Would you agree it is a typographical?

Mr. Frates: Yes.

Mr. Montgomery: In any event, it goes like it has here, "Mrs. Firestone had bought the ring in July, of 1961, obtained insurance [119] on it and paid the premiums. He used portions of the insurance proceeds for payments to jewelry and clothing firms and applied the balance toward other debts, mortgages and taxes. Mrs. Firestone contends that the ring was a gift to her, that she was the sole lawful beneficiary of such insurance proceeds and seeks to collect the same from defendant. The Court has concluded that this claim must be denied.

A claim has been presented by the plaintiff's former attorneys, Miller, Cone, Owen, Wagner and Nugent, Esquires, for their costs and fees as her counsel in earlier stages of this proceeding, which is proper and allowable in the opinion of the Court. A further claim by the same legal firm is presented for hotel expenses incurred by the plaintiff and her brother, who had been appointed guardian of her person at that time, in the amount of $9,233.50, which was paid by her former attorneys because of a guarantee made by them to the hotel at which plaintiff and [120] her brother resided from November 25, 1964, to January 29, 1965. This claim is denied, without prejudice.

In 1962 the parties acquired as tenants by the entirety a residence at 236 Pendleton Avenue, Palm Beach, Florida. This residence constituted the mari-

tal domicile of the parties from the date of purchase until their separation, and the wife continues to reside therein. There was a mortgage balance of approximately $38,000 as of January, 1966, which has been reduced by monthly payments since then. The Court finds that this home should be awarded to Mrs. Firestone as a residence for herself and the child with the remaining mortgage indebtedness to be assumed by Mr. Firestone.

Mr. Firestone owned eight thoroughbreds which he allowed Mrs. Firestone to race under her name and colors. Mrs. Firestone claims to be entitled to the horses or the value thereof. She also claims the value of furniture and chandeliers purchased for their Dallas apartment and subsequently [121] disposed of by Mr. Firestone. These claims are denied. Mrs. Firestone further contends that Mr. Firestone should be required to pay sundry bills in various amounts up to $23,000 incurred by her during the marriage, which were submitted in evidence. The Court is of the opinion that claims of this nature are more appropriately litigated by the purported creditor and debtor in a Court of law than in a Court of chancery jurisdiction, and therefore the claim in such respect is denied without prejudice.

Expert testimony offered by the plaintiff and defendant as to the amount of a reasonable fee for the services of plaintiff's counsel varied between $43,260 and $95,000. The Court is of the opinion that a reasonable fee for such services is the sum of $50,000, including $10,000 heretofore awarded as a temporary counsel fee.

The premises considered, it is thereupon

ORDERED AND ADJUDGED as follows:

[122] 1. That the equities in this cause are with Mr. Firestone; that Mr. Firestone's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are forever dissolved.

2. That custody of the minor child, Mark Alan Firestone, is hereby awarded to Mrs. Firestone with reasonable rights of visitation reserved unto Mr. Firestone. Mr. Firestone shall pay unto Mrs. Firestone the sum of $750 per month for the care, maintenance and support of said minor child, beginning January 1, 1968.

3. That Mr. Firestone shall forthwith transfer all of his right, title and interest in and to the marital domicile located at 236 Pendleton Avenue, Palm Beach, Florida, unto Mrs. Firestone, Mr. Firestone to assume the outstanding mortgage indebtedness.

4. That Mr. Firestone shall pay unto Mrs. Firestone the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every [123] month thereafter until the death or remarriage of Mrs. Firestone.

5. That Mrs. Firestone's claims for insurance proceeds collected by Mr. Firestone as a result of the theft of the said diamond ring, for the said race horses or value thereof, for the value of the said furniture and chandeliers and for the said sundry unpaid bills are severally denied.

6. That the claim by Mrs. Firestone's former attorneys for reimbursement of expenses guaranteed by them for Mrs. Firestone and her brother is denied, without prejudice.

7. That Mr. Firestone pay unto the firm of Farish and Farish as attorneys for Mrs. Firestone the sum of $50,000, which shall include the amount of $10,000 heretofore awarded as temporary attorneys' fees to said firm. Mr. Firestone shall pay to the firm of Miller, Cone, Owen, Wagner and Nugent the sum of $3,500 for their legal services in Mrs. Firestone's behalf, together with the further sum of $856.92 [124] in reimbursement of costs and expenses.

8. The costs shall be taxed upon further hearing after notice.

DONE AND ORDERED this 15th day of December, A.D. 1967. Signed, James R. Knott, Circuit Judge."

Mr. D'Aiuto: May we proceed, Your Honor?
The Court: Yes, proceed.
Mr. D'Aiuto: Call Mr. Gregory to the stand.
The Court: Ladies and gentlemen of the jury, there is one more—something must be done out of your presence, so we will take a little recess and counsel will take care of it during the recess and then we can proceed and it will save a little time, so if you will retire to the jury room at this time.

(Thereupon, the jury left the Courtroom and the following proceedings were had in their absence, to-wit:)

(Thereupon, a bench conference was held out of the hearing of the Court reporter.)

The Court: We will take a fifteen minute recess.

(Thereupon, a short recess was taken.)

[125] The Court: Are you ready to proceed, gentlemen?
Mr. D'Aiuto: We are ready, Your Honor.
The Court: All right. Call the jury, please.

(Thereupon, the jury returned to the Courtroom and the following proceedings were had in their presence and hearing, to-wit:)

(Bench conference out of the hearing of the Court reporter.)

The Court: Go ahead and call your witness.
Mr. D'Aiuto: We call Reverend Dan Griffin, Your Honor.

THEREUPON, DANIEL LEE GRIFFIN, called as a witness for and in behalf of the plaintiff, after being by the Clerk of the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

Direct Examination by Mr. D'Aiuto:

Q. State your full name for the record, please.
A. Daniel Lee Griffin.
[126] Q. Where do you reside, Reverend Griffin?
A. 4412 Azile, Tampa, Florida.
Q. What is your profession, sir?
A. I am a minister.
Q. For what faith or church?
A. Southern Baptist.
Q. Would you relate to the jury your educational background leading up to your ministry?

A. I have a Bachelor of Arts from Oklahoma Baptist University and a Bachelor of Divinity from Louisville Seminar, Southern Baptist Seminar in Louisville.

Q. Are you married, sir?

A. Yes, sir.

Q. Do you have any children?

A. I have three.

Q. Reverend Griffin, did you have occasion to serve as pastor in Palm Beach County during the years 1967 through, I believe, 1969?

A. I was the associate pastor of the First Baptist Church here in West Palm Beach from June 15, 1967, to June 29, 1969.

Q. During that period, who was the minister?

A. Doctor Jess Moody was the senior minister.

Q. Do you happen to know where Doctor Moody is at the present time?

[127] A. I'm sorry, I didn't hear you.

Q. Do you happen to know where he is at the present time?

A. Yes, sir. He is in Japan attending the Baptist World Alliance which is held every five years.

Q. Now during the period that you served as the assistant at the church there, did you have occasion to become acquainted with Mary Alice Firestone?

A. Yes, sir.

Q. And when did you first become acquainted with Mrs. Firestone?

A. In the fall of 1967, early fall.

Q. Did you actually meet her at that time and talk to her or just——

A. Just saw her at church. I wasn't formally introduced at that time.

Q. When did you actually first meet her to talk to her, if ever?

A. It was shortly thereafter when Doctor Moody was there. I was preaching for him the first time I saw her and he was gone and the next two or three times that she was in church when the occasion came for all of us to come together at the back door as people were leaving and he introduced me to her.

Q. Do you recall approximately what time of year that was?

[128] A. It was in the fall of '67.

Q. Now you say you saw her at church. Would she come to church by herself or with anyone?

A. She often brought her son.

Q. Did you meet him also?

A. Yes.

Q. Now do you happen to have any familiarity with an article that appeared in Time magazine in December of 1967?

A. Yes, sir.

Q. Were you a subscriber to Time magazine at that time?

A. Yes, sir.

Q. Did you happen to read the article labeled Milestones?

A. Yes.

Q. When you read that article pertaining to Mary Alice Firestone, did you know her at that time? I mean personally, or just having met her and seen her around.

A. Just a casual acquaintance.

Q. When you read that article, sir, did you believe it?

A. Yes, sir.

Mr. Frates: Your Honor, there is no claim for damage to her reputation. There is no claim in this claim for damage as a result of this article to her reputation. That is [129] exactly what the reverend is talking about now.

The Court: How about that?

Mr. D'Aiuto: We are not asking anything about her reputation, Your Honor. We are asking him if he read the article and if he believed it.

The Court: What difference would it make whether he believed it or not, if you don't claim any damage to her reputation?

Mr. D'Aiuto: Then I will withdraw the question and move to strike the answer.

The Court: All right, fine. Strike the answer.

Mr. D'Aiudo: And instruct the jury to disregard it.

The Court: Yes, disregard it. This will be immaterial because there is no claim for damage to the reputation of the plaintiff.

Mr. D'Aiuto: Thank you, Your Honor.

By Mr. D'Aiuto:

Q. Reverend Griffin, after you had read that Time article did you have occasion to discuss it with Mrs. Firestone, and if so, when was it?

A. No, sir, there was no occasion to discuss the article per se.

[130] Q. All right. Did you see her after that article came out?

A. Yes.

Q. Would you relate to the jury when you saw her and where you saw her and under what circumstances?

A. She called the office for an appointment with Doctor Moody and he was out of town, so as associate pastor I tried to take appointments that he couldn't take, and I took an appointment with her in, I suppose, about the early spring of '68.

Q. All right. Was this the first time you had ever counseled with her?

A. Yes.

Q. About how long did that counsel take place? How long were you with her on that first occasion?

A. About forty-five minutes, something like that.

Q. Did you ever have any occasion other than that one time to meet with her in the same——

A. There was a subsequent appointment, probably a month or so after that.

Q. And when you first saw her, would you describe to the jury her mental state or emotional state with respect to this particular Time article, if it was mentioned?

Mr. Frates: Your Honor, there again is a leading [131] question. The reverend has not answered it. And has said he hasn't specifically per se discussed this with her, so counsel is now trying to lead him and the reverend hasn't said any such thing. There has been no conversation about this article.

The Court: Objection sustained.

Mr. D'Aiuto: I will rephrase it. Thank you, Your Honor.

By Mr. D'Aiuto:

Q. Did you, during the course of counseling with Mrs. Firestone, did the subject of the Time article come up?

Mr. Frates: Now, Your Honor, excuse me, sir. He has already answered that and I object to counsel now asking him and he says he has not per se discussed the article.

The Court: I had thought he said that he had not discussed the article per se. Now maybe I am incorrect.

Mr. D'Aiuto: Maybe I can ask him to explain.

By Mr. D'Aiuto:

Q. What do you mean by you did not discuss the article per se?

The Court: All right. You can answer that.

[132] The Witness: She did not say, "Did you read the article?" The nature of the article came into the conversation. The fact that she was in an emotional state brought on by whatever it was that caused her to call a minister. I did not presume any kind of problem to be had. I was aware of some of the problems that had been public knowledge in her life via publications in the mass media.

The Court: All right.

The Witness: Is that satisfactory?

Mr. Frates: I think he has answered the question very clearly.

The Court: Very good, reverend. Ask the next question.

By Mr. D'Aiuto:

Q. Reverend, with respect to the Time magazine article itself, you said she did make some reference to that, is that correct?

A. Yes.

Q. Would you relate just what that reference was and what——

A. Well, her concern centered around her son, Mark, the fact that he was at an age old enough to be aware [133] a little bit at four years of age some of the problems that his mother was going through, and her concern was, her anxieties more for him and for how he would react in future years.

Mr. Frates: Excuse me, Your Honor. Again, I object because we are again talking about reputation. You are relating to reputation of someone else and the effect on that person on what her reputation might or might not be. And they have withdrawn—excuse me. There is no claim in this case for that and this is immaterial, Your Honor. It is very difficult.

The Court: It is true, it is a little difficult to separate some of it, but I think, Mr. Frates, the testimony now, her concern about the effect upon her son, we are not interested in the effect on her son, but we are interested—I think she has a claim on—at least I ruled that she may attempt to present a claim. I am not saying she has one, I think she may attempt to present a claim of emotional disturbance.

Mr. Frates: But, Your Honor, he has not related this was related to the Time article.

[134] Mr. D'Aiuto: Your Honor, I believe he has.

The Court: I don't know. Is he competent to say that is related to it?

Mr. Frates: Well, Your Honor, I don't think he is competent, no. I would agree, I don't think he is competent. He has said she had many problems.

The Court: Correct, and I think he is entitled to testify from what he could observe as to her emotional state at the times he saw her. I think then it is a matter of argument whether it came from the Time article or not, but Mr. D'Aiuto didn't ask that. So I say he can be allowed to testify as to his observation of her mental state and he has already said she had plenty of problems. Go ahead. If you want to make another statement on the record, it is all right.

Mr. Frates: What concerns me, Your Honor, is, she comes and tells him and that is the self-serving declaration.

The Court: Right, and I don't intend to let him testify as to what she tells him and that is why he hasn't said anything yet about what she told him with reference to an article or [135] no article, but I think he can testify as to her state, his observations of her emotional state at that time.

Mr. Frates: Your Honor, I think he then said that the effect of her problems on her son.

The Court: Well, there is no claim. I think the jury can understand, I will instruct them there is no claim about her son, but there is a claim for her own emotional problems, which is the only claim she has.

Mr. D'Aiuto: And the mental anguish over the effect on her son.

Mr. Montgomery: There are other elements pertaining.

The Court: Well, they all actually come in that general category. I will overrule the objection at this time except I think Mr. D'Aiuto knows what I ruled.

By Mr. D'Aiuto:

Q. With respect to counseling with her, would you describe to the jury then her emotional state with respect to when she brought up this particular article, not what she said about the particular article, but describe what her emotional state was with respect to that article.

[136] A. Well the word that comes to mind was distraught, frustrated, not knowing exactly how to interpret, and where to turn for help. I think it would be permissible for me as a minister without broaching ministerial ethics

to say that most of the people who come to see me usually come out of a sense of longing for something more secure than what they have, and I think in this frustration, she wanted to reaffirm some kind of spiritual worth, spiritual relationship with the deity, a higher power, and in our talking together we came to the cause and effect, the reason she was confused, the reason she was frustrated, and this came out of her concern for her son and the things that had been in upheaval in her life. The spiritual upheaval of her life led her to seek out a minister's counsel.

Q. Was the Time article one of those things?

Mr. Frates: Again, this leading, Your Honor. He keeps repeating this and repeating this and the reverend doesn't say this.

The Court: I will sustain your objection. You are correct, Mr. Frates.

By Mr. D'Aiuto:

Q. With respect, Reverend Griffin, to the Time article which is the subject of this law suit, was that one [137] of the items that was discussed?

A. Yes.

Mr. D'Aituo: I have no further questions.

The Court: Do you have any questions?

Mr. Frates: Just a couple.

Cross Examination by Mr Frates:

Q. Reverend, did you testify at the divorce proceeding?

A. No, sir.

Q. Of course, that in itself had to be an experience that was probably traumatic and would make someone distraught, would you agree with that?

A. Yes, sir.

Q. You are aware that it was sort of prominently displayed and discussed in the newspapers for some seventeen months?

A. Yes, sir, this was why I read the article.

Q. This certainly in and of itself would cause someone to be distraught, would it not?

A. Yes.

Q. You don't know any of the facts, do you, sir, about the divorce case, what the grounds were, what the counterclaim was?

A. No, sir.

Q. Do you know what her husband, Russell Firestone, had [138] counterclaimed for?

A. No, sir.

Q. In fact, you know very little about that, do you?

A. That's correct.

Q. I don't want to ask you to breach any confidence, but this young lady had many, many problems, didn't she?

A. Well, I was aware of a few, I suppose.

Q. And you couldn't, in fairness, tell this jury what part, if any, was applied to what she might have read in Time magazine or her divorce or her many other problems, could you, really?

A. No, sir.

Mr. Frates: Thank you, Reverend.

The Court: Is that all of this witness?

Redirect Examination by Mr. D'Aiuto:

Q. But a part of it was applied to Time magazine, was it not?

A. Yes.

Q. And with respect to how she was prior to the divorce decree, and prior to this article when you observed her at church and met her at the door of the sanctuary, wherever

it was, was she distraught at that time or as distraught as when you described her when she called for your assistance in the spring [139] of 1968?

A. Yes.

Q. The same distraught——

Mr. Frates: He answered the question.

The Court: He said yes. What is your next question?

By Mr. D'Aiuto:

Q. You say yes. Was she as distraught prior to this Time article as far as when you observed her and saw her——

Mr. Frates: Excuse me, Your Honor. He has posed the question to him and the reverend has answered the question. I object on the grounds this is repetitious and a leading question.

The Court: Objection overruled. Did you understand the question?

The Witness: Well, let me say this. From the time I have—all the time I have known Mrs. Firestone she has been a distraught, upset person.

The Court: All right. Fine.

By Mr. D'Aiuto:

Q. With respect to being a distraught and upset person when you counseled with her in the spring of 1968, [140] there was a portion of that counseling that was related to the Time magazine article, was it not?

Mr. Frates: That is a leading question.

The Court: I sustain the objection. He has already answered that. You asked him about that. Objection sustained.

Mr. D'Aiuto: No further questions.

The Court: Thank you very much, Reverend, for your help.

(Witness excused.)

Mr. Montgomery: Your Honor, we call next Mrs. Blicher, Mrs. Mary Blicher.

THEREUPON, MARY W. BLICHER, called as a witness for and in behalf of the plaintiff, after being by the Clerk of the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

Direct Examination by Mr. Montgomery:

Q. Would you state your name, please, ma'am?
A. Mary W. Blicher.
Q. Are you married?
A. Yes, sir.
[141] Q. What is your husband's name?
A. Doctor Barney Blicher.
Q. Is he an M.D. or dentist?
A. He is a dentist.
Q. Where do you live, Mrs. Blicher?
A. 2600 North Flagler.
Q. Mrs. Blicher, do you happen to know Mary Alice Firestone?
A. Yes.
Q. Approximately how long have you known her, please, ma'am?
A. Since about eighteen years.
Q. Was she a patient in Doctor Blicher's office when you were there?
A. Yes.
Q. Did you assist your husband in and about the office during the time when she came in?

A. Yes.
Q. And I'd like to invite your attention to approximately January or February and March of 1968 and ask you this question, please, ma'am, as to whether or not anything unusual occurred in your presence to Mrs. Firestone during those particular months, and if so, when, please, ma'am.
A. It was in February, if I remember correctly, of '68.
[142] Q. How do you pinpoint that date so the jury will know?
A. Well, it was shortly after an article appeared in the Time magazine.
Q. All right.
A. And she came in for some dental work and something was mentioned about this article that had appeared in Time.
Q. What occurred, please, ma'am?
A. What occurred?
Q. Yes, ma'am, tell the jury.
A. Well, she became hysterical and she was just uncontrollable and the reason was that she was terribly upset about the article because she said it was not true and her main concern was the bearing that it would have on her son Mark.
Q. Now, Mrs. Blicher, you had seen or had you seen Mrs.——

Mr. Frates: Excuse me, counsel. Your Honor, I move to strike all that testimony. It is self-serving, it is hearsay.

The Court: Mr. Frates, I think some of it is improper and I think some of it is all right in the same answer. I think if she could tell what the time was and what she observed and what took place there. I think the part that is improper are the statements [143] made by the plaintiff. I don't

think those are admissible, what she stated, why, or what was bothering her. I don't think those are proper and I will instruct the jury, those are not admissible under the hearsay rule. Also the portion when she says that the reason was that she was worried about something. I think that is inadmissible. The fact that she was distraught and upset and something happened, I think is admissible and it can be argued whether it had anything to do with it or not as a matter of argument.

Mr. Montgomery: It goes to the state of mind and if I might take Mrs. Blicher back through it, would the Court please?

The Court: You can, but we musn't have hearsay.

By Mr. Montgomery:

Q. You mentioned an article as I understand, or it was mentioned in your presence?

A. Yes.

Q. And after the mention of the article, then what did you observe, without going into what Mrs. Firestone told you or anything. What did you observe?

A. She was hysterical.

[144] Q. As a result of this hysteria and her emotions there, was it necessary for you or Doctor Blicher to do anything for her?

A. Yes, we gave her a sedative.

Q. All right. Now going back prior to this time, you had observed her of course during the divorce proceedings that had lasted for a number of months, had you not?

A. We had seen her occasionally, yes.

Q. Had you ever seen her at any time, Mrs. Blicher, in the emotional state that you saw her in, I believe you said in February, 1968?

A. No, I hadn't. I had never seen her like in that condition before.

Mr. Montgomery: Thank you very much. You may inquire.

Cross Examination by Mr. Frates:

Q. Did you testify in the divorce proceedings?

A. No, I didn't.

Q. Are you a close friend of Mrs. Firestone?

A. No, I am not.

Q. How often have you seen Mrs. Firestone back in the period of time since '67?

A. We have done extensive dental work for Mrs. Firestone.

[145] Q. She is one of your best customers?

A. No, I wouldn't say the best. She is a good patient.

Q. A good patient, a good customer?

A. Whatever you call it, patient.

Q. And that is the occasion you saw her when she would come to your——

A. Yes.

Q. Do you know anything about the facts of the divorce case and what happened and all of that?

A. Only hearsay and what Mary Alice has told me.

Mr. Frates: Thank you.

The Court: Anything else?

Mr. Montgomery: Yes, Your Honor.

Redirect Examination by Mr. Montgomery:

Q. Mrs. Blicher, on the average, approximately, just approximately if you can, how many patients during the working week come through your office there?

A. During the week?

Q. Yes, ma'am, or daily is what I am getting at.

A. Approximately twenty. Some days more, some less.

Q. Now after December 22nd or say after Christmas of 1967, did you hear discussed among the patients this particular Time article?

A. Yes.

[146] Mr. Frates: Your Honor, again I move that that question be stricken and ask Your Honor again to instruct the jury that she is not claiming any damage to her reputation and I think counsel is trying to do this indirectly.

Mr. Montgomery: May it please the Court?

The Court: Yes, sir.

Mr. Montgomery: The purpose of this is to show publication of the article itself among the general community in addition—in other words, to the number of articles that were sent out that here is a person who knew that this particular article was discussed. In other words, it goes to publication and that is the sole purpose of it and that is the sole purpose that I wanted it.

The Court: I will sustain the objection. I don't believe under what you claim it is too material. The material part is her problem.

Mr. Montgomery: Then can we admit without question the article was in fact published without proof then? In other words, other [147] than the Time magazine, is that one of your defenses?

Mr. Frates: Mr. Montgomery, I would appreciate it if you wouldn't make—I have made an objection and I think His Honor has sustained it.

The Court: I sustained it.

Mr. Frates: And I ask Your Honor piease to instruct the jury that there is no claim for damage to her reputation.

The Court: I think they are pretty well aware of that now, but that is a fact. Both lawyers have told the jury that to begin with. Mr. Montgomery told them that and I have sustained the objection because I think that question is improper under the circumstances. So let's go from there.

Mr. Montgomery: I have nothing further.

The Court: Thank you very much, Mrs. Blicher. You can be excused.

(Witnessed excused.)

Mr. D'Aiuto: Your Honor, we call Mr. John Casey.

[148] THEREUPON, JOHN CASEY, called as a witness for and in behalf of the plaintiff, after being by the Clerk of the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

Direct Examination by Mr. D'Aiuto:

Q. State your name for the record, please.

A. John Casey.

Q. Where do you live, Mr. Casey?

A. In West Palm Beach, at 307 Buckingham Road.

Q. Are you married, sir?

A. Yes, sir.

Q. Do you have any children?

A. Two.

Q. How long have you lived in Palm Beach County?

A. I was born and raised here.

Q. What about your wife, was she also born and raised here?

A. No, she was born in Alabama, but lived most of her life here.

Q. Do you happen to know Mary Alice Firestone?

A. Yes, sir.

Q. How do you happen to know Mrs. Firestone, and when [149] did you first meet her?

A. We went to school together, my wife, Mary Alice and myself.

Q. What school was that?

A. Palm Beach High School.

Q. What is your employment, Mr. Casey?

A. I am a Detective Sergeant with the City of West Palm Beach Police Department.

Q. How long have you been with the City?

A. Twelve and a half years.

Q. Mr. Casey, you have then known Mrs. Firestone since high school days, is that correct?

A. Yes, sir.

Q. And she is a friend of yours and your wife?

A. Yes, sir.

Q. Did she have occasion to visit in your home at any time?

A. Yes, sir.

Q. And did she specifically have occasion to visit in your home subsequent to December, 1967?

A. Yes, sir.

Q. Approximately how many times have you seen Mary Alice Firestone at your home since that time?

A. Quite a few. I couldn't——

Q. Let's limit it to 1968, say the first six months of [150] 1968. Did Mary Alice Firestone visit your home with you and your wife and children during that period?

A. Yes, sir.

Q. Were you aware of an article, a Time magazine article printed in December of 1967 relating to Mary Alice?

A. Yes, sir.

Q. Did you read the article yourself?

A. No, not personally.

Q. When Mary Alice Firestone visited you at your home was the Time article ever discussed or brought up?

A. Yes, sir.

Q. Did anything unusual occur with respect to Mary Alice's conduct with respect to discussion of that Time article?

A. Well, right after the article came out in December of '67, a few months later Mary Alice visited our home and she was very upset about the article and she talked to my wife and I about it, because of the wording in it. She was worried about what it would do to her son later on, Mark, and she was just generally upset.

Mr. D'Aiuto: I have no further questions.

Mr. Frates: Your Honor, again I move that that be stricken, about what it would do to her son.

[151] The Court: The last portion of it?

Mr. D'Aiuto: Your Honor, I'd like to be heard with respect to that mental anguish and what she was worried about goes to her state of mind and the effect of that article with respect to her state of mind.

The Court: The question is that I have ruled she is entitled to show her state of mind. Now for some witnesses to come in and repeat and say what the reason was, which is of course what she had told him, or it is his opinion. Either way it is incompetent.

Mr. D'Aiuto: I understand your ruling.

The Court: In my opinion, but the portion of testimony wherein he describes her condition, that is, I ruled is proper. When the reason is given this comes under the hearsay rule and so you will disregard that portion of it, and I think the jury under-

stands that, but the portion, Mr. Frates, about what he observed as to her state of mind, I have ruled is proper, so your objection is sustained as to the one portion.

Mr. D'Aiuto: Thank you, Your Honor.

[152] *By Mr. D'Aiuto*:

Q. Mr. Casey, without stating what she said or anything which is hearsay under the circumstances, would you relate to the jury just what she did to make you observe that she was upset emotionally? Was it the maner in which she talked, or what did she do?

A. Well, she related to us the article and she was very upset because of the article and she didn't cry or anything like that, but she was upset and distraught because of the article, in my opinion.

Q. Was it visible? Could you tell by looking at her, was it visible?

A. Yes, sir.

Mr. D'Aiuto: No further questions.

Cross Examination by Mr. Frates:

Q. Mr. Casey, do you know whether she was distraught about the fact that Mr. Firestone had been awarded the divorce? Was she distraught about that or upset about that?

A. Not that I can recall, no, sir.

Q. Never mentioned it?

A. No, sir.

Q. Are you aware of the fact that an appeal was taken on her behalf?

[153] Mr. D'Aiuto: Your Honor——

The Court: Finish your question.

By Mr. Frates:

Q. Did you know that, and was she distraught about that?

Mr. D'Aiuto: I will withdraw the objection.

The Court: Go ahead and answer.

The Witness: Repeat the question.

By Mr. Frates:

Q. Did you know she or her attorneys on her behalf took an appeal to the Appellate Court as a result of the divorce action? Did you know that, sir?

A. I am not too familiar with her divorce action from the local Courts and the appeals. I know that she got a divorce.

Q. Well, do you know who was granted the divorce, Mr. Casey?

A. I believe it was her husband.

Q. Was she distraught about that?

A. Not that I can recall. We didn't discuss the divorce too much.

Q. You didn't discuss the divorce, but you discussed a paragraph in Milestones in December of '67, but you didn't discuss the divorce while it was proceeding for some seventeen months?

A. Well, we talked generally about the divorce.

[154] Q. Was that upsetting, the proceedings themselves, from your observation of her?

A. The proceedings of the divorce?

Q. Yes, sir.

A. Not that I can recall, no, sir.

Q. Didn't bother her a bit?

A. Didn't bother her?

Q. From your estimation. Do you know of any other problems she might have, any other physical problems?

A. No, sir.
Q. Or any other medical problems, Mr. Casey?
A. No, sir.
Q. Never heard those discussed or talked about?
A. No, sir.

Mr. Frates: Thank you.
The Court: All right.
Mr. D'Aiuto: No further questions.
The Court: Thank you, Mr. Casey.

(Witness excused.)

THEREUPON, ALVIN E. MURPHY, M.D., called as a witness for and in behalf of the plaintiff, after being by the Clerk of the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

[155] *Direct Examination by Mr. D'Aiuto*:

Q. State your name for the record, please.
A. Doctor Alvin E. Murphy.
Q. Doctor, are you a medical doctor?
A. Yes.
Q. And do you have a specialty or general practice?
A. Internal medicine and cardiology.
Q. Where do you maintain your offices?
A. 394 Royal Palm Way, Palm Beach.
Q. How long have you lived here in Palm Beach County and practiced your profession?
A. Since 1945.
Q. Where do you presently reside?
A. 230 Pendleton Avenue.
Q. Do you know the plaintiff, Mrs. Mary Alice Firestone, sitting here in the Courtroom?
A. Yes, sir.
Q. Where does she live in relation to your home?

A. Next door to me, the next door west.
Q. How long have you known Mary Alice Firestone, Doctor?
A. Vaguely since we moved into the house about four years ago. Not closely at all, but——
Q. You have not been her actual physician back in 1967, and she wasn't coming to you for medical treatment?
[156] A. No.
Q. Are you familiar with the Time magazine article Milestones which was printed by Time magazine in December of 1967.
A. Yes.
Q. Did you read it yourself?
A. Yes.
Q. And did you have occasion to see Mary Alice Firestone during the Christmas holidays following that article coming out?
A. Yes, I did.
Q. Would you relate to the jury the circumstances under which you saw Mrs. Firestone and what, if anything, you did for her at that time?
A. Well, she was quite upset, nervously and distraught and she was worrying about the article and crying a good bit.
Q. Was this in your home or in her home, or just where?
A. Her home.
Q. In her home?
A. Yes.
Q. As a result of your observation of her, did you give her anything or do anything for her?
A. Yes, I found out that her heart and lungs and her blood pressure was all right and there was no obvious [157] physical abnormality. I gave her a very strong sedative by injection and then she hadn't been able to get hold

of her own attending physician, so I went back to my house and got a doctor's sample of a sedative and gave it to her, advising her to be sure and give the doctor the note that I wrote out and to show him the sample of the sedative.

Q. Was this the only occasion that you had occasion to discuss the article or give Mary Alice Firestone any treatment as a result of that article?

A. Yes.

Mr. D'Aiuto: I have no further questions. Thank you.

Cross Examination by Mr. Frates:

Q. Doctor Murphy, just a few questions. When, approximately, was this incident?

A. Sometime during the Christmas holidays.

Q. What was the status of her divorce case at that time, Doctor, if you know?

A. I don't know. There was a good bit of publicity about it and I don't really remember the status at that time.

Q. Did you know that there was a final judgment in the [158] divorce case? Were you aware of that about the same time?

A. I don't think I was aware of that.

Q. You knew of course that it had been going on for some seventeen months?

A. Yes, I knew it had been going on a long time.

Q. There were closed sessions and sometimes the press was asked to leave, things of that nature. Did you know that that generally was transpiring?

A. I wasn't aware of any of the details, no.

Q. Did you know who was granted the divorce?

A. No, I don't.

Q. Do you know that her husband was granted the divorce in December?

A. I didn't know.

Q. Of 1967?

A. I didn't know that.

Q. This of course would be things that would cause somebody to be distraught, wouldn't it, Doctor?

A. Yes.

Q. Upset?

A. Yes.

Q. Nervous. Who is her physician, Doctor?

A. I really don't know. She told me at the time and I just wrote a little note for her to give to him.

[159] Q. Do you know her medical history and background the last, say five years?

A. Only by hearsay.

Q. Yes, sir. Are you aware of the fact of the numerous problems that she has had during the last few years?

A. Only what you hear, just hearsay.

Q. Then you were aware of problems other than problems that she might have had?

A. Yes.

Q. And the types of problems that you heard were the type that would be upsetting and cause her to be distraught and things of that nature, wouldn't they, Doctor?

A. Yes.

Mr. Frates: Thank you very much.

Redirect Examination by Mr. D'Aiuto:

Q. That physical condition that you heard about by hearsay, that was when she sustained a basal skull fracture in an automobile accident, is that correct?

A. Yes.

Mr. D'Aiuto: I have no further questions.

Recross Examination by Mr. Frates:

Q. Doctor, are you aware of the fact that she was under [160] medical treatment and had a doctor taking care of her?

A. I beg pardon?

Q. Were you aware of the fact that she was under medical treatment and had a doctor taking care of her?

A. When I saw her?

Q. Yes.

A. Yes, I knew that.

Q. And of course he would know better than anyone her medical history and background and things of that nature.

A. Oh, yes. I only did an emergency thing for a neighbor.

Q. And, Doctor, you really don't see her very often, do you, in the relatively short period of time you have lived next to her?

A. No, not very often.

Mr. Frates: Thank you, Doctor.

The Court: Thank you very much, Doctor. You can be excused.

(Witness excused.)

The Court: Gentlemen, I think we will, if it is all right, recess at this time. Would counsel come forward just a minute?

(Bench conference out of the hearing of the reporter.)

[161] The Court: Ladies and gentlemen of the jury, we are at a point right now where it is convenient to recess. I'd like to start at 9:00 o'clock tomorrow morning, which I can do. Some morn-

ings I can't, but tomorrow morning I can, so I will ask you to please observe the instructions which I gave you when you left at noon. I think you remember them, and not discuss the case.

Now something else, don't form any opinions yet as to what the outcome should be, because you haven't heard all the evidence of course and you haven't heard the instructions of the Court. Don't discuss it with your families tonight. They are going to ask you about it. Tell them that the Court has instructed you not to talk to them about the case at all until after you have rendered your verdict. Tell them if they will wait until after you have rendered your verdict, you will be free to tell them everything that happened. Obviously you don't want your minds to have comments in it from other people, [162] particularly people close to you, so we don't want you to have any of those thoughts imposed here and so your mind can be kept free for your own thoughts until the proper time, and again remember what I said about any news broadcasts or any articles in the newspaper. Just don't read them or don't listen to them and please be in the jury room promptly at 9:00 o'clock tomorrow morning and we will open Court at that time and the case is going right along and I don't think there has been any great waste of time at all.

Mr. Bailiff, will you show the jury out at this time.

(Thereupon, the jury left the Courtroom at 4.32 o'clock p.m. for the evening recess.)

The Court: I am going to recess now. I have to organize some papers here, so the Court will be in recess at this time.

(Thereupon, at 4:33 o'clock p.m., the Court was recessed until 9:00 o'clock a.m. the following morning.)

[163] CERTIFICATE

* * *

[165] BE IT REMEMBERED the following proceedings were had and testimony adduced before the HONORABLE CULVER SMITH, one of the Judges of the above-styled Court, and a jury, duly empanelled and sworn, in the County Courthouse, in the City of West Palm Beach, County of Palm Beach, State of Florida, beginning at the hour of 9:07 o'clock a.m., on Tuesday, July 14, 1970, with appearances as above-noted, to-wit:

The Court: Good morning, gentlemen.

Mr. Frates: Good morning, Your Honor.

Your Honor, may I bring a matter up before Your Honor brings the jury in?

The Court: All right.

Mr. Frates: Your Honor, I'd like to have marked the Palm Beach section of the Miami Herald, Tuesday, July 14, 1970, on Page 2-B, where it has a story, Herald Bureau, West Palm Beach, Florida, and in there it has obviously a story about the trial. In there it says, "Montgomery will ask the Judge only two questions." They are referring to Judge Knott. "Did Knott grant the divorce on grounds of adultery? Did he tell the Time's correspondent adultery [166] was the ground for divorce?"

I don't accuse Mr. Montgomery of making the statements.

Mr. Montgomery: The reporter asked me what I was going to ask Judge Knott and I told him.

Mr. Frates: I certainly don't want to get involved in personalities, Your Honor, but I think this is highly improper and I think the danger in whatever the motives, I am not concerned, all I am concerned about is the effect. He knows we are going to object to Judge Knott testifying about the decree or his interpretation of the decree and I submit, Your Honor, this is doing nothing but trying the case in the newspaper.

I know Your Honor instructs jurors not to read these things, but somehow through families it is very difficult, as Your Honor knows, and well intentioned people know what is happening. Now these two questions do nothing but say he is going to ask them, so obviously the answer is that it is in their favor, and I just think it [167] is highly improper and I am not going to ask Your Honor for a mistrial, but I do ask Your Honor to again instruct the jury at whatever time Your Honor feels appropriate that they are not to consider anything other than the evidence in this Courtroom, but I don't think this is the way and I am quite surprised at counsel that tells reporters of what his next questions are going to be. I just don't think that is the way to practice law.

Mr. Montgomery: Put this on the record. I have talked to Judge Knott and I have asked him these two questions. Those are the two questions that I intend to ask Judge Knott and he said the answer is no to both of them, so put that in the record.

Mr. Frates: Well, I just talked to Judge Knott and Judge Knott instructed you that he does not

want to testify. He doesn't think that he should testify and he doesn't think that he should interpret this. That was just a few minutes ago. Counsel, I don't care whether you talk to him—

The Court: Just a moment. I feel that whether [168] or not Judge Knott wishes to testify about any official act of his is up to him. Secondly, then it would be up to me to determine whether the question asked was admissible under the other rules. Thirdly, and if he decides to call Judge Knott, I will send Mr. Montgomery in to ask Judge Knott if he wants to testify.

Mr. Montgomery: At 9:30 I have it set up, Your Honor.

The Court: Well, it isn't 9:30.

Mr. Frates: He is not aware of it, Mr. Montgomery.

The Court: Just a moment. Do you have something else to ask before 9:30?

Mr. Montgomery: Yes, sir, I do.

The Court: All right. Good. When the jury comes in I will ask them if they have read or heard any articles, have they obeyed my instructions.

Mr. Frates: Well, Your Honor, if I may be presumptuous and ask that at the appropriate time to tell them not to pay any attention to anything. Just reaffirm it and not ask them did they obey it. I [169] don't want to get them on the defensive. I would ask Your Honor when Judge Knott is called that out of the presence of the jury we submit—propound some questions because again I don't want to be in the position of having to object in front of the jury and leaving the impression that we are trying to keep evidence away from this jury.

The Court: Well, I don't know. If Judge Knott——

Mr. Frates: That probably is not——

The Court: I won't say anything to the jury about it at this time except at an appropriate time to reiterate, not to read anything. I have already told them that.

Mr. Montgomery: Thank you, Your Honor.

The Court: Call the jury. Mark that Defendant's Exhibit A for identification.

(Thereupon, the document referred to was marked Defendant's Exhibit Number A for identification only.)

The Court: Call the jury.

(Thereupon, the jury returned to the Courtroom after the [170] overnight recess and the following proceedings were had in their presence and hearing, to-wit:)

The Court: Have a seat, please.

Mr. Montgomery: Call Ursula Nadasdy.

THEREUPON, URSULA NADASDY, called as a witness for and in behalf of the plaintiff, after being by the Clerk of the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

Direct Examination by Mr. Montgomery:

Q. Would you state your name, please, ma'am?

A. Ursula Nadasdy.

Q. Where do you live?

A. In New York City.

Q. And how long have you been in Palm Beach County?

A. Since Sunday.

Q. How did you get down here?

A. I flew down.
Q. At whose expense?
A. Time Magazine's.
Q. Are you employed by Time magazine?
[171] A. Yes, I am.
Q. Where are you staying here in Palm Beach County?
A. The Royal Heart Motel, Palm Beach.
Q. Is that in Palm Beach?
A. Yes, it is.
Q. And are there any other persons with Time Magazine in that motel or hotel with you?
A. Yes, sir, there are.
Q. Who are they, please, and tell me what they do.

Mr. Frates: Your Honor, we are all staying at the Heart of Palm Beach. All of the witnesses, Mr. Medina, Mr. Stewart and myself. I don't know as this is material or relevant to anything.

The Court: Is it?

Mr. Montgomery: May it please the Court, in the event I do not call a witness in order to comment to the jury on the unavailability of a witness it is necessary to show that he was available as I understand the law and consequently I must lay a proper predicate and foundation to show the availability of a witness, so I might comment perhaps on closing argument as to why in the event the defendant sees fit [172] not to call that witness he wasn't called and this is the purpose of my examination, sir.

Mr. Frates: Well, I don't know who you are referring to. If you are referring to Mr. Delaney, you have had him under subpoena and he has been sitting out here since 10:00 o'clock yesterday.

The Court: I will let him go ahead with this. Overrule the objection. You didn't actually state your objection, but I assume you do. Go ahead.

By Mr. Montgomery:

Q. Who all came down for this particular trial from Time magazine?
A. A Mr. Doerner.
Q. And who else?
A. Myself.
Q. What about Mr. Duncan? Do you know who Mr. Duncan is?
A. Yes.
Q. Who is Mr. Duncan?
A. Mr. Duncan works for Time magazine.
Q. Where is he presently?
A. I have no idea.
[173] Q. Is he still with Time, Inc., do you know?
A. I think so.
Q. Was he in the Miami office at the time of this incident wherein Time published an article pertaining to the divorce between Mr. and Mrs. Firestone?
A. Yes, he was.
Q. But you don't know his whereabouts?
A. I have no idea where he is now.
Q. He is not down here to testify, is that correct, to your knowledge?
A. I haven't seen him.
Q. Would you know him when you see him?
A. Yes.
Q. Have you talked to him over the telephone?
A. No.
Q. Never?
A. When?

Q. Have you ever talked with him over the telephone?

Mr. Frates: Your Honor, Mr. Montgomery seems a little aggressive this morning.

Mr. Montgomery: Withdraw the question.

Mr. Frates: I just wish he would let the witness answer the question before you charge in there with the next one.

The Court: He withdraws that question.

[174] *By Mr. Montgomery*:

Q. When is the last time you talked with Mr. Duncan, either personally or by telephone?

A. I can't remember exactly.

Q. Could you remember the year?

A. Not really, because he has been in and out of the office at various times since I have been working for Time magazine, so the last time I spoke to him I have no idea, really.

Q. Miss Nadasdy, I am having a little difficulty hearing you. Would you mind speaking up just a little bit?

A. All right.

Q. You have a soft voice. If you would speak up where everybody can hear, I'd appreciate it.

Now, you are employed by Time magazine, and in what capacity?

A. I am a researcher for Time.

Q. I want to show you, it says State of New York, County of New York. Do you recognize that?

A. Yes, I do.

Q. What is it, please?

A. It is an affidavit.

Q. When was that filed, please?

Mr. Frates: Your Honor, I don't understand the procedure that we are going through. [175] Show-

ing her the affidavit, I don't have any objection, but he has called this witness and she is employed—

Mr. Montgomery: I haven't asked her anything about the affidavit except to identify it.

Mr. Frates: You are arguing your case and that is all right, but I don't understand what he is leading up to.

The Court: I don't know either yet, and it is impossible for me to say anything right now, Mr. Frates.

Mr. Frates: All right.

The Court: I can't say whether it is, I don't know what he is leading up to.

By Mr. Montgomery:

Q. When was that affidavit made, please, ma'am?

A. I will have to look at the date.

Q. Yes, ma'am, if you refresh your recollection.

A. September 10, 1968. It says—

Q. Do you recall what the purpose of that affidavit was?

A. Yes, I do. As it states.

Q. Yes, ma'am. Who prepared the affidavit for your signature?

A. I don't know. I was presented with it by one of our members of the legal staff.

[176] Q. Time, Inc., has a legal staff?

A. Yes, it does.

Q. Where is the legal staff located?

A. We do have consultants who are in the building, in the Time and Life Building.

Q. So you have, as I understand, a legal staff in the same building where you publish a magazine and you do your work?

A. We can call them, yes.

Q. How many lawyers are on that legal staff?

A. I don't know.

Q. Have you ever been to the legal department of that building?

A. Yes, I have.

Q. How many floors or rooms does it take up?

A. I would have to guess the exact number of rooms.

Q. Please, if you would.

A. I don't know. I think there are the secretarial offices and I think maybe four or five offices.

Q. Four or five offices. How many attorneys are there in the Time-Life Building?

A. I don't know. I have met two of them.

Q. You have met two of them at least, is that correct?

A. Yes.

Q. Miss Nadasdy, when you made this affidavit, it was of [177] course true, was it not?

A. Yes, of course, true to the best of my knowledge.

Q. Now would you tell the jury just what you—in December of 1967, just what your occupation and profession and your duties were for Time, Inc., at that time?

A. At that time I was also a researcher as I am right now.

The Court: You will have to repeat that.

The Witness: I was a researcher.

By Mr. Montgomery:

Q. What is a researcher? What do you do?

A. A researcher is a person who works with the writer getting the materials together necessary for a story. You call up the library to see if we have any files pertaining to the story, you get it all together, give it to the writer as things come in. Of course, they are in the time lag on occasions since the news is breaking and it takes a while to find

things whatever, so you continuously deliver whatever you can find on the subject. Then the story is written, it is edited and then it comes back and is seen by the monitoring editor and it goes to the checking copy. The checking copy is still working paper on which you make changes because [178] you have sent queries out to correspondents, you have double checked things. It is still, you know, still changed, depending on of course what one gets for the accuracy of the story.

After that, you turn—once you have finished it, you actually turn the checking copy in, you have, to the best of your knowledge from the information available to you at the time think it is correct and you are responsible for that.

Q. Is it a Time requirement that the reporter that places a mark above each word to be checked to say that she has checked that word for accuracy?

A. Generally, yes, it is.

Q. Do you recognize this, please, ma'am?

A. Yes, I do.

Q. What is it?

A. It is a Xerox copy, I presume, of a checking copy, though I don't see the checking copy stamp on it, so I am not quite sure.

Mr. Frates: Counsel, excuse me. We have the original here that I think, if we are going to refer to it——

Mr. Montgomery: All right. Thank you.

The Witness: This says, "unused" in any case.

Mr. Frates: Can we have that marked for [179] identification?

Mr. Montgomery: I am going to put it in evidence in just a second.

Mr. Frates: All right.

The Witness: Yes, that is a checking copy.

It has my name on it which was sent to me, my initials, my handwriting.

By Mr. Montgomery:

Q. You just told us, as I understood it, the requirement in Time is to place a mark above each word to be checked and indicate that it has been checked, that word has been checked, is that correct?

A. No, I did not say that. Right now I didn't quite say that. That is in the affidavit, fine, but it said generally when cases are marked, but when you turn in the checking copy even if you haven't placed a mark on something, it means—wait, please, it means that you have—once you have turned the checking copy in, you, unless you mark very clearly that something is wrong with it, that it is otherwise —it has your stamp of approval. It has your stamp of approval once you have turned the checking copy in, though generally you mark every word, or try to.

Q. Why do you mark every word?

Excuse me, Miss Nadasdy, before I get into that, [180] have you ever seen me before except walking in the hall?

A. No. Yesterday was the first time.

Q. Have you ever talked to me or anyone from my office before?

A. No.

Mr. Montgomery: Your Honor, I am surprised. I have not talked to this witness. This is her affidavit, I have the lines marked there and I'd like to be able to ask her leading questions and request please that she be made a hostile witness.

Mr. Frates: Your Honor, I think this is absurd and I don't think he has any right to do that in any sense of the word.

The Court: You object to it?

Mr. Frates: Yes.

The Court: I am going to sustain the objection.

Mr. Montgomery: We'd like to mark this in evidence as plaintiff's next numbered exhibit.

The Court: All right. Any objection to that?

Mr. Frates: No, Your Honor.

The Court: It will be admitted.

[181] (Thereupon, the document referred to was marked Plaintiff's Exhibit Number 5, received in evidence and made a part of the record.)

Mr. Frates: Counsel, if you want any other of those documents, we have all the originals and we will be glad to make them available.

By Mr. Montgomery:

Q. Miss Nadasdy, would you come down here, please, ma'am? Do you see the word, "adultery" marked in this? Do you see the word "adultery" as spelled out in this particular piece of paper that I have, ma'am?

The Court: He is asking you.

The Witness: Me. I'm sorry. Yes, I do.

By Mr. Montgomery:

Q. Would you point it out to the jury?

A. Right there.

Q. Is there a line over it that it was checked for accuracy?

A. There is no line over it. There is a line over "by," neither is there a line over "41," neither is a line over "extreme cruelty" and neither is a line over "17", neither is a line over that.

Q. Well, those particular words, were they important, [182] the ones that didn't have a line over them?

A. Yes, they are. I think "extreme cruelty" is certainly important. I think "by", you know, to indicate whether somebody who divorces—I think it is rather important. Age is irrelevant, I suppose.

Q. Thank you. You may take your seat. Have you seen the Time article?

A. Yes, I have.

Q. Is this word for word for what was in it?

A. I don't know. I would have to check.

Q. You were aware as researcher so far as accuracy was concerned that Mrs. Firestone had indeed received alimony, is that correct?

A. Yes.

Q. You had a legal staff there at your building, I believe you said, is that correct?

A. Yes.

Q. And it was your job as researcher to test the accuracy, the truthfulness and the correctness as I understood your testimony. Is that correct?

A. To test it?

Q. To make a determination.

A. Yes.

Q. Did you ever ask your legal department whether or not [183] a person convicted of adultery in Florida, that is a woman, could receive alimony?

A. No, I did not ask that.

Q. Now, Miss Nadasdy, when were you working on this article? What was the day of the week?

A. The date, I would have to check with the various materials available because offhand I don't remember the exact date, though the day was a Friday.

Q. It was a Friday or Saturday?

A. Friday and Saturday, but it began on Friday evening.

Q. I hand you the final judgment in the divorce of Firestone versus Firestone, marked as Plaintiff's Exhibit Number 2. Plaintiff's Exhibit Number 2, and ask you to to look at it, please, ma'am. Have you ever seen that before or a copy of it?

A. I have seen a copy of it, yes.

Q. When?

A. Sometime in January or February of '68. Subsequent to the story.

Q. That was then after Time put in Milestones?

A. Yes, it was.

Q. This article about which we are here?

A. Yes.

Q. Did you ever ask to see that final judgment?

A. As with every divorce item that you do in Milestones, [184] precisely the legal and technical grounds for divorce.

Q. Please, ma'am, I asked you did you ask this question?

A. In answer, I am answering the question.

The Court: Just a moment. Let me tell the witness first, you are not to speak up and you are not trying this case. Do you understand you are here to answer questions only? Only questions. Never mind——

Mr. Frates: Your Honor, excuse me. May I also suggest, Your Honor, and I agree with the admonition to the witness, I think, Your Honor, it is my impression that Mr. Montgomery is also being extremely aggressive. He has a right to ask her questions, but he is trying to cut her off and I think that he should be cautioned, both of them should be cautioned.

The Court: Mr. Frates, I don't think—you see, he asked her a very simple question and she started out with, maybe it is an explanation, I don't know, but that is not the question.

Mr. Frates: I agree with that and I think that was improper, but I think also through the interrogation that he has been overly aggressive.

[185] The Court: Well, I don't know. I think everybody gets a little over aggressive about a matter which to us is just a matter of routine business and I don't think we should, any of us, get too excited except to make—everyone has a right to make an objection when they feel that something is out of line of course. Now at this point I ask the reporter to read that question.

(The reporter then read the pending question.)

The Witness: I did not ask for the final judgment, but I asked for the exact grounds on which the divorce was granted in the words of the judge. And I have—

Mr. Montgomery: All right. Thank you, ma'am.

By Mr. Montgomery:

Q. You asked who?

A. I sent a query from New York to our Miami bureau.

Q. To whom in the Miami bureau?

A. It is just addressed to the Miami bureau and then they say—

Q. Then you asked the Miami bureau to give you the exact wording of the Judge so far as the grounds of divorce were concerned, is that correct?

[186] A. May I see?

Q. Please, ma'am, just answer my question. Did you ask them for the exact grounds in the words of the Judge?

A. Yes. No, I would like to ask, may I—

The Court: Just a moment. Your lawyer wants to make an objection and I want to hear him.

Mr. Frates: Your Honor, I think she asked for her query which she sent.

The Witness: To see my exact words of what I had down.

Mr. Frates: Which we have in the file which counsel has seen and which is part of this file and, if Your Honor please, if he wishes to ask her—

The Court: What she wants to do is refresh her memory from the exact dispatch or whatever you sent, is that correct?

The Witness: Right. It was a query which I sent to the bureau.

Mr. Frates: Yes, Your Honor, counsel has it.

Mr. Montgomery: Put it in evidence right now.

Mr. Frates: Mr. Montgomery, if I may have that marked for identification.

The Court: Mark it for identification, please.

[187] (Thereupon, the document referred to was marked Plaintiff's Number B for identification only.)

The Court: Now, she has asked to see this to refresh her memory and that is what we are doing right now.

Mr. Frates: And counsel has a copy of all these documents, in your file which we have given to you.

The Witness: It says—may I read it?

By Mr. Montgomery:

Q. Just read whether or not you requested that portion of it at this particular point. We will get to others, please, ma'am.

A. Need the grounds.

Q. I have not finished with my question.

A. I'm sorry.

Q. You have that before you now?

A. Yes.

Q. To refresh your recollection, do you not?

A. Yes.

Q. I will ask you this question. Did you ask your Miami bureau to give you the grounds for the divorce in the words of the Judge?

[188] A. Yes. I have.

Q. I show you defendant's exhibit—excuse me, Your Honor, I'd like to introduce this in evidence, if the Court please, at this time.

Mr. Frates: Mr. Montgomery, I have no objection.

The Court: All right. It will be admitted.

The Clerk: That should have been Exhibit C, instead of B.

Plaintiff's exhibit for identification now in evidence as Plaintiff's Number 6 without objection.

Mr. Montgomery: I'd like for the jury to see this, please.

The Court: Very well, you have the right.

Mr. Montgomery: Your Honor, may I say that they are going to have this in the jury room, but may I just point out this one sentence because that is the only thing I am interested in right at this moment.

The Court: Sure. They will have it with them.

Mr. Montgomery: May I tell the jury to start with the word, "be"?

The Court: All right.

Mr. Montgomery: If you would pass it on down. Just that one sentence.

[189] *By Mr. Montgomery*:

Q. Is that what you got back in regard to that inquiry?

Mr. Frates: What exhibit is that, please.

Mr. Montgomery: Excuse me, Mr. Frates, I should have identified it. Plaintiff's exhibit in evidence Number 4.

The Court: All right. Let her read it.

The Witness: Yes, it is.

By Mr. Montgomery:

Q. What——

A. One of the answers, I think.

Q. Are there any quotations in that particular inquiry, quotation marks?

A. Yes.

Q. Did you interpret those quotation marks as a researcher as being the words of the Judge?

A. Yes.

Q. And read to the jury where it begins "The Judge, however," and indicate to them, please, ma'am, those words in quotations from the Judge.

A. "The Judge, however, in quite a colorful opinion said that 'neither of them has shown the least susceptibility to domestication and that the marriage should be dissolved.'"

Q. Thank you, ma'am. Do you have any supervisor? Who [190] is your supervisor?

A. Currently?

Q. No, ma'am, if you don't mind, we are back in December, December the 15th and 16th of 1967, and without telling you each time, that is what we are interested in at this point. So with that kind of preamble, if you would think about at that particular time, I would appreciate it.

Now, your supervisor at that particular time when you were doing this particular article?

A. Mary Lois Vega.

Mr. Montgomery: Your Honor, may I show this to the jury, please?

The Court: Yes.

Mr. Montgomery: Plaintiff's Exhibit Number 4, beginning with the quote, "The Judge, however," and the quotation marks, please.

By Mr. Montgomery:

Q. Who was your supervisor, director, at the time you checked this article for accuracy?

A. The top supervisor as I said was Mary Lois Vega, and the lady in the section was Miss Nancy Chase.

Q. When is the deadline for Milestones? When was it on Saturday, December 16th of 1967?

A. I can't remember the exact hour. Usually I think we [191] had that nothing would happen after 8:00 o'clock, but then if something was not finished, you worked sometimes until midnight. It varied.

Q. Consequently, Saturday was the deadline?

A. Yes. Saturday, whatever the hour.

Q. December 16, 1967, is that correct?

A. Yes. If that was the 16th, the date for that Saturday.

Q. Time and your department and everybody was working against a deadline, weren't they?

A. Yes, sir.

Q. I'd like for you to refresh your recollection again with your affidavit. This underlining portion here at Page 2 of that affidavit, please, ma'am.

A. As Exhibit 2 indicates, in fact I did check each word, making the necessary corrections and assuring myself that the item as returned was accurate in every respect.

Q. Then you did in fact check each word so far as your affidavit is concerned, is that correct, for accuracy?

A. Yes, I have.

Q. You have no mark, however, on the word "adultery", do you, ma'am?

A. No, I don't.

[192] Q. Was that a significant word to you, Miss Nadasdy?

A. Of course it was.

Q. Did you have anything before you pertaining to a quotation from the Judge that he had found Mrs. Firestone guilty of adultery, anything?

A. May I see all the things that I listed?

Q. See anything you want.

A. May I see all the things?

Q. Please. I withdraw that question.

Mr. Frates: Just a minute, Your Honor. The witness—may I see them, the Daily News article which shows the AP, which shows it, the wire from Duncan and which shows it?

The Court: Now, gentlemen, if we want to make any specifics, we will excuse the jury. Don't you think he has a right to withdraw the question? You are going to cross-examine.

Mr. Frates: All right. He withdrew it. I guess he does, Your Honor.

Mr. Montgomery: I withdrew it.

By Mr. Montgomery:

Q. Miss Nadasdy, do you know who Mr. James Linen is?

A. Yes, I do.

Q. Who was he in 1967?

[193] A. I think he was president then.

Q. Did you assist him in making his sworn answers to interrogatories in this particular case?

A. No.

Q. Was anyone from your department, to your knowledge, asked to assist Mr. James Linen, the president of Time, Inc., so far as the answers go to the sworn interrogatories?

A. I don't know.

Q. Assume that Mr. Linen, who was the president of Time magazine on the 15th day of October, 1968, was asked the question, Number One, did you make any attempt to confirm or verify the information contained in said publication prior to the same being published, to which he answered yes.

A. Could you read that again, please?

Q. Yes, ma'am. As a matter of fact, if it will make it clearer to you, I will let you read it.

A. Number 22?

Q. Number 22 is the one I have circled.

Mr. Montgomery: Your Honor, I told Judge Knott I would let him know at 9:30.

Mr. Frates: Perfectly all right with us if you want a recess. I can take this witness.

Mr. Montgomery: I don't want the witness off.

[194] Mr. D'Aiuto: I will step out and see the Judge.

The Court: You can go see Judge Knott.

By Mr. Montgomery:

Q. Miss Nadasdy, I have a very difficult time. Is it Miss Nadasdy?

A. That is right. That is the correct way of saying it in any case.

Q. Miss Nadasdy?

A. Okay.

Q. You know who I am talking about?

A. I think so.

Q. Did you read that question?

A. Yes.

Q. This is directed to Mr. James Linen and for the jury I will read it over with the Court's permission. "Did you make any attempt to confirm or verify the information contained in said publication prior to the Time article being published?" That is the article pertaining to Mrs. Firestone which Mr. Linen, the president of the corporation, said yes.

The next question, Interrogatory Number 23, "if so, state the name and address of each person contacted, the information obtained from each person, whether you contacted plaintiff or her agents, to ascertain the facts concerning the alleged information [195] that you had obtained from others."

The answer to that Interrogatory Number 23, (a) the name and address of each person contacted. (a) Associated Press dispatch, Miami Herald, Joseph D. Farish, Jr., James R. Knott.

(b) Associated Press dispatch, Miami Herald, Joseph D. Farish, Jr., said that the technical grounds for divorce were extreme cruelty and adultery. James R. Knott confirmed that information previously telephoned by Delaney to Time's office was accurate.

Now my question to you is this, from your research, so far as you are concerned, do you agree with the president of your corporation that the sources were these listed in Interrogatory Number 23, that is, the Miami Herald dispatch, the Associated Press dispatch, Judge Knott, and Mr. Farish?

A. That she had been contacted for——

Q. I'm sorry, ma'am, I didn't understand you.

A. Is it that these four sources had been contacted for the publication of them?

Q. That is what the answer said.

A. That is what the record shows.

Q. May I see that? Did you check the AP dispatch?

A. May I see again whether it was in the carbon of the [196] story?

Q. Yes, ma'am. It is Defendant's Exhibit Number 1.

The Court: This is what you wish to see?

The Witness: Yes.

Mr. Montgomery: The AP dispatch.

The Witness: It is, yes.

By Mr. Montgomery:

Q. Now, researching is your business, right?

A. Yes, it is.

Q. Tell me whether that AP dispatch says that the Judge found Mrs. Firestone guilty of adultery. Tell me where.

A. "Milestones. Industrial heir Russell A. Firestone was granted a divorce Friday from his third wife, former West Palm Beach school teacher."

Mr. Frates: I can't hear.

The Witness: "He had accused of adultery and extreme cruelty."

The Court: Read it a little slower so counsel can hear.

Mr. Frates: I couldn't hear you.

The Witness: Shall I read it again?

The Court: Do you want to read it?

Mr. Montgomery: No, sir, I just want to see if there is anything in that AP dipsatch that [197] says the Judge found Mrs. Firestone guilty of adultery in the divorce case of Firestone versus Firestone.

The Court: Why don't you read it and then if you can answer it, answer it.

The Witness: Certainly implications of it.

By Mr. Montgomery:

Q. Would you print that a person was guilty of adultery as a researcher for Time, Inc., based on that AP dispatch and approve it, ma'am?

A. No, I wouldn't use only AP.

Q. Then you would not?

A. Use only——

Q. All right. I show you now the Miami Herald article, please, ma'am, Plaintiff's Exhibit in evidence Number 3. After refreshing your recollection, I will ask you, as a researcher for Time magazine, would you have printed in Time magazine or okayed for accuracy that the Judge had found Mrs. Firestone guilty of adultery?

The Court: Based on this?

Mr. Montgomery: Yes.

The Court: Based on this item?

Mr. Montgomery: Yes, sir.

The Court: Now you read it to yourself.

The Witness: Again, there is a suggestion of it.

[198] *By Mr. Montgomery:*

Q. Would you print in Time magazine, or okay it for printing?

A. Just on this?

Q. Yes, ma'am.

A. No.

Q. Let's take Defendant's Number 1, the AP dispatch, and that article both, would you on behalf of Time as their researcher, okay for printing that Mrs. Firestone had been found guilty by Judge Knott of adultery?

A. Not on these two alone, no.

Q. All right. Thank you, ma'am.

Now your president of your corporation says that he depended, or Time, Inc., depended upon the Associated Press dispatch, Defendant's Exhibit Number 1; the Miami Herald article, Defendant's Exhibit Number 3; Mr. Joseph D. Farish, Jr., and Judge Knott in these answers to his interrogatories. That was the source of this information?

A. Yes.

Q. You will have to speak up.

A. I'm sorry, yes.

Q. And you have told this jury and this Court that upon at least the AP article and the Miami article, you, [199] as a researcher, would not okay from those two sources a printing that Mrs. Firestone had been found guilty, is that correct?

A. On those two alone, no.

Q. Did you know, Miss Nadasdy, that Judge Knott was never contacted until after the dispatches were received by Time?

Mr. Frates: That is not true, Your Honor. That is not correct.

The Court: Just make an objection.

Mr. Frates: I withdraw it.

The Court: Go ahead. Objection withdrawn.

By Mr. Montgomery:

Q. Did you know that?

A. I had no idea.

Q. Did you ever receive any supplemental report at least for your researching purposes subsequent to 1:25 p.m., December 16, of 1967?

A. I have some other files for the story.

Q. You have some other files?

A. Yes, some more correspondence pertaining to it.

Q. Prior to 1:25?

A. I can't remember the hour, no.

Q. What do you have?

A. I remember there was another file. May I see it?

Q. Certainly.

[200] A. But I don't know as to which came first and I don't know the hours.

Q. While Mr. Frates is looking for that, let me ask you this question——

Mr. Frates: Just a minute.

Mr. Montgomery: I am going to come back to it.

The Court: Do you have an objection?

Mr. Frates: If she is referring to the news report, there is another one attached here. This one which is an original and I don't know whether she is referring to that. I think this has been referred to from time to time by the Herald that actually isn't the news.

The Court: Take a look at it.

Mr. Montgomery: This is not a Herald——

Mr. Frates: It is referred to as the Herald article.

The Court: What is your question?

Mr. Montgomery: My question to her is, that when these——

The Court: He is going to ask another question. We are going to clarify the question. Go ahead and state the question.

Mr. Montgomery: Yes, sir, kind of early in the [201] morning, Judge.

The Court: I think you got up too early. Take your time now because we are interested in getting the facts.

Mr. Montgomery: Yes, sir, we sure are.

By Mr. Montgomery:

Q. Referring to Plaintiff's Exhibit Number 4, it has up there, "Telephone record, 13." What is that?

A. I am not sure what the number indicates, no.

Q. What does telephone——

A. Telephone record, it says correspondent telephones in and a record takes down his words.

Q. The exact words of the correspondent are taken down on a record when he calls that in, is that correct?

A. It is reporting, yes.

Q. For what purpose?

A. For speed.

Q. And accuracy? To make sure that you understand?

A. No, not at all. This is received by—this comes in like the records are already printed.

Q. How long are the records kept?

A. I have no idea.

Q. Do you have the record?

A. No.

Q. Have you ever seen the record?

[202] A. No.

Q. Did you listen to the record?

A. No. I only see the printed——

Q. Do you know who might have that telephone conversation?

A. I am afraid I don't know.

Q. Before you checked this for accuracy, did you see the Miami Herald article that you just looked at?

A. I don't recall.

Q. You don't recall? Did you use the Miami Herald article for purposes of checking the accuracy or did you depend purely on Mr. Delaney and his report?

A. I don't recall seeing that particular article.

Q. You asked or directed to the Miami bureau a specific and absolute inquiry that you and Time, Inc. wanted the grounds for divorce in the words of the Judge?

A. Yes, I had said that.

Q. Why was that so important?

A. Because the legal grounds for divorce are necessary. Normal customary checking proceess. That one doesn't take just the word of AP or whatever other source, but you ask your correspondents to get the exact grounds of the divorce.

Q. Or lawyers?

A. Excuse me, sir?

Q. Or lawyers? Do you depend, if you call somebody up [203] on the telephone, a lawyer for instance, that is engaged in a case, do you depend on that?

A. I would presume that he would know the grounds on which the divorce is granted.

Q. Did you ever ask him to call the lawyer and ask him for the grounds of the divorce?

A. No. I guess not on that inquiry, no.

Q. Did he ever tell you, showing you this dispatch from Delaney, wherein it says according to the technical grounds for divorce from Mr. Farish. Would you, as a researcher of Time depend upon that to publish in over three million copies that Mrs. Firestone had been found guilty of adultery?

A. I would certainly trust her lawyer, if he gives that information.

Q. That is not my question. My question——

Mr. Frates: Counsel, excuse me, let her finish the answer.

The Court: Let her finish. You don't want to repeat it. Let her finish this.

The Witness: In the file it says, "The technical grounds for divorce according to Joseph Farish, Jr., an attorney for Mary Alice Firestone, were given as extreme cruelty and adultery." Yes, I would trust that.

[204] *By Mr. Montgomery*:

Q. An you would print in Time magazine?

A. Yes, I would trust that.

Q. What is the next sentence, the Judge——

A. "The Judge, however, in a quite colorful opinion, said that neither of them has shown the least susceptibility to domestication and that the marriage should be dissolved."

Q. I see. You put in there, did you write up this article? Did you write this article?

A. No, I did not.

Q. Who wrote it?

A. The writer.

Q. Who was the writer?

A. Mr. Doerner.

Q. Is he here?

A. Yes, he is.

Mr. Montgomery: Your witness. Hold it just one second.

No further questions. You may inquire.

Cross Examination by Mr. Frates:

Q. Miss Nadasdy, may I ask you a personal question? Are those prescription glasses you have?

A. Excuse me?

[205] Q. Are those prescription glasses?

A. Yes, they are.

Q. Those are not just sun glasses, are they?

A. No, they are not.

Q. Some people, including myself, sometimes wonder why people wear——

Mr. Montgomery: I object to this kind of business.

The Court: Objection overruled. I think it is all right to ask her about those glasses because she has testified. The jury may want to know.

The Witness: I am sorry, but they are prescription glasses.

The Court: You don't need to make a statement about that. I just cautioned you about that. You just answer questions.

By Mr. Frates:

Q. Tell us a little about where you went to school.

A. I went to college, you mean?

Q. College.

A. I went to Manhattan Industrial College in Purchase, New York, studied political science.

Q. Speak up so the jury and counsel can hear you.

A. Studied political science, majored in political science [206] and after graduation, shortly after that, I began to work for Time magazine.

Q. How long have you worked for Time magazine?

A. Five years.

Q. And as a researcher during that particular time?

A. For four and a half years.

Q. You have related the general duties of a researcher. Do you work as teams generally to research the writer and one of the editors?

A. Yes, I do, very definitely.

Q. And did you do that in this item?

A. Yes, we had.

Q. Miss Nadasdy, let's go back to the beginning of this particular quote in Milestones. What is Milestones, just briefly?

A. Milestones is a column or perhaps two columns in which you report births, deaths, marriages, divorces, children, of important people. Newsworthy, important people whom usually—I think that is the best answer.

Q. Did you work on Milestones particularly or was this just one of the jobs you did as a researcher, or were you assigned to Milestones?

A. I was assigned to Milestones, yes.

Q. Back in '67?

[207] A. '67, yes.

Q. Are you still working?

A. No, I am not.

Q. What part are you in now?

A. Right now I am in the World section, which is the international news section, the middle east expert.

Q. Miss Nadasdy, we have got the original spread around here. Let me ask you if you recall this particular article, and I don't have it marked, counsel. I think you have a copy of it in your file.

A. Yes, I do.

Q. All right. Now can we start at the beginning, when was the first time that this matter was brought to your attention, the Firestone divorce, for Milestones?

A. For Milestones?

Q. For Milestones.

A. Bill Doerner, the writer, had come into my office.

Q. You can't relate what he said?

A. No, came into my office, showed me the AP wire.

Q. All right. Now just so we get the sequence here, the AP wire, which is Defendant's Exhibit Number 1, is this the first?

A. Yes, it is.

Q. The first document that you had?

A. Yes, it is.

[208] Q. Now I am sure that we all—I won't bother with this. Can you tell us how this is received at Time offices?

A. How it is received? I'm sorry.

Q. Does it come in on a teletype?

A. Yes, it comes in on Telex, of course.

Q. And this is the Associated Press, is that correct?

A. Yes, it is.

Q. Just in the way of background, and this was the Associated Press and that was sent from West Palm Beach, correct, as it shows here?

A. Yes, it is. That is the dateline.

Q. Now that in the first paragraph stated that Russell Firestone was granted a divorce from his third wife, former West Palm Beach school teacher that he had accused of adultery and extreme cruelty. Is that what the first paragraph is?

A. Yes, it is.

Q. Then it goes on. Now, when you got this AP, what did you do?

A. When I got this AP I called the library to see if we had any files at all pertaining——

Q. Excuse me. When you say the library, is that your research library?

A. That is Time's own research library, yes, it is. I called them to ask them for the folders, if there [209] were any, to bring everything down to me. The next thing was to send a query to the Miami bureau.

Q. All right. Now did you do that in writing or a telephone conversation?

A. In writing.

Q. We had it here, Exhibit 6, but I don't see it.

A. I have this.

The Clerk: Here is Number 6.

Mr. Frates: All right. Defendant's Exhibit 6—Plaintiff's Exhibit 6. Sorry, I guess it is plaintiff's exhibit. Half and half, but I guess it is plaintiff's. All right.

The Witness: Yes.

By Mr. Frates:

Q. Did you send that on a telephone machine or wire, or go through that procedure?

A. I take it down to the cable desk and they send it.

Q. Now will you read that to the jury?

A. The whole thing?

Q. Yes, the whole thing.

A. Miami Bureau from Applegate.

Mr. Montgomery: Applegate is who?

The Witness: From Applegate, she was at the cable desk, responsible for sending——

The Court: Read it slowly now and loud so they [210] can all hear you.

The Witness: December 15, 1967, Milestones scheduling the divorce granted to Russell A. Firestone, Jr. from his wife, Mary Alice Firestone. Need the grounds on which it was granted in the words of the Judge. When were they married? Need birthdate for both parties as well as for their son. How much alimony will she get? What about the custody of their child? What is the correct spelling of his name? Understand that the Court hearings were quite something. Socialites, police, detectives, testifying on behalf of both parties. Need usable quotes.

By Mr. Frates:

Q. So those were the inquiries, and why did you send that to the Miami bureau?

A. Why to them?

Q. Yes.

A. Because we always like to have verification from our correspondents.

Q. Now did you—what else? We will go back to the reply to that, but what else did you have available at the time you had the AP report, anything, any other [211] newspaper articles?

Mr. Montgomery: If Your Honor please, I object to that. The defendants are bound by the interrogatories propounded to them setting forth those particular matters as shown by the answers to the interrogatories of President Linen, and I object to this, if the Court please.

Mr. Frates: Counsel, we are not trying to be unbound by anthing. The record in this case shows the various newspaper articles that were in the file.

The Court: Just a minute. It seems to me that if there is testimony brought out that contradicts something that one of their persons has said, this is a matter of argument. It may weaken what they said or strengthen something else. I don't know, but the fact the president said we had certain things, if someone else says something else——

Mr. Montgomery: Fine. I withdraw the objection.

Mr. Frates: Your Honor——

The Court: The objection is withdrawn. Go ahead and let her answer the question.

[212] Mr. Frates: We take the position, Your Honor, it does set out what was there, but we can argue that later.

The Court: That is argument.

By Mr. Frates:

Q. Tell the jury what newspaper articles, if any, you had at the same time.

A. I think I also had the Daily News of Saturday, which usually arrives about Friday evening at 10:00 o'clock or somewhere around there, when I was still at the office.

Q. Now did you have this particular article? Do you recall that?

A. Yes, I do recall that article, yes.

Mr. Frates: We ask that this be marked for identification.

The Court: Mark it, Mr. Clerk.

(Thereupon, the document referred to was marked Defendant's Exhibit B for identification.)

By Mr. Frates:

Q. Now would you read that to the jury, please?

A. The whole article?

Q. Yes.

[213] Mr. Montgomery: That is not evidence. I object to that, if the Court please.

The Court: It isn't in evidence. Objection sustained. It is not in evidence at this point.

By Mr. Frates:

Q. In there, does it——

Mr. Montgomery: I object to what is in there, if the Court please. It is not in evidence.

By Mr. Frates:

Q. Did you have other evidence indicating adultery was involved?

Mr. Montgomery: I object to that, if the Court please.

The Court: Other evidence?

Mr. Montgomery: Yes, but in other words if there is nothing in evidence, if the Court please.

The Court: Well, he asked her if she had other evidence. Objection overruled. Go ahead. Did you have other evidence?

By Mr. Frates:

Q. Would you answer that, please?

Mr. Montgomery: I object to the question on the [214] grounds that this is not a case wherein adultery was involved, but the Judge found her guilty of adultery. Now that is the question, if the Court please.

The Court: This is correct, but this is cross examination, too.

Mr. Frates: Yes, sir. Thank you.

The Court: I will overrule the objection.

By Mr. Frates:

Q. Did you have other newspaper articles where adultery was mentioned?

A. Yes.

Q. Now, what answer did you get from your inquiry there?

A. Should I read again the——

Q. No.

A. We did get answers to it.

Q. All right. Now, who gave you the answers, and in what form did you get the answers?

A. Got it in wire form. It comes through our Telex machine.

Q. We notice on this one that there is some—excuse me just a second. Referring to Plaintiff's Exhibit 6, there are some lines crossed out here. Number 6, by red pencil here. Did you do that?

A. No, I didn't.

[215] Q. Do you know who did do it?

A. I have no idea.

Q. I show you plaintiff's exhibit—excuse me, I am having trouble reading these numbers. I think that is Number 4. I am trying to look at it up here. Was that the reply to your inquiry?

A. Yes, I think so, it was.

Q. All right. Well, examine it now, Miss Nadasdy, and make sure.

A. It was a partial answer.

Q. Partial answer?

A. Yes.

Q. But anyway, did that come back in reply, one of the replies to your inquiry?

A. Yes, I think so, definitely.

Q. Would you read that, please, and tell the jury who sent it and where it came from. Read the whole thing.

A. December 16th.

Q. This is Plaintiff's Exhibit 4, I think.

A. December 16th, 1967.

Q. Not so fast, and a little louder.

A. From Bob Delaney, Miami, to Applegate.

Q. Excuse me again. Bob Delaney's name has been mentioned. Is he a stringer?

A. Yes, he is.

[216] Q. For Time? Can you tell-well, that is all right. We will go into that later. He is a stringer for Time?

A. Time magazine.

Q. In the south Florida area?

A. Right.

Q. All right.

A. For Milestones, Firestone divorce. The name of Firestone is spelled Russell, R-u-s-s-e-l-l, A. Firestone, Jr. He was 41 years old sometime in July. His wife is named Mary Alice, and she just had her 32nd birthday a week or two ago. They were married in New York City August 1st, 1961. Their son, whose name is Mark, was born January 31, 1963. I have double checked the alimony at Duncan's request.

Q. Excuse me. Now Duncan was the bureau chief at Miami?

A. Yes, he was.

Q. All right.

A. I have double checked the alimony at Duncan's request and it is to be $3,000 a month for her plus $750 a month for child support. She was given custody of Mark, their son. The technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery. The Judge, however, in a quite colorful [217] opinion said that neither of them "has shown the least susceptibility to domestication and the marriage should be dissolved." Judge Knott said, "She (Mary Alice) urges that her marriage be preserved in order to protect guileless womankind from the defendant's roving marriage tendencies." As paraphrased by her counsel, "He should not be allowed to hop from wife to wife while leaving a child here and there along the way." The Judge also said, "It might be argued with equal plausibility that the present marriage should be preserved for the defendant's own protection from predatory females whose amorous instincts seemingly are instantly aroused to fever pitch by the charm of his wealth."

Q. What date is that?

A. December 16th.

Q. December 16th, is it the Saturday, we went into that.
A. Yes.
Q. The 15th was Friday.
A. Friday was the 15th.
Q. The 16th was Saturday?
A. Yes.
Q. Miss Nadasdy, you didn't know Mary Alice Firestone or Russell Firestone or any of these people?
A. No, I did not.
[218] Q. When you received this wire from Mr. Delaney in which he said the technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery, did you accept that as——
A. Yes, I did.
Q. —as true?
A. Yes, I did.
Q. You felt that was sufficient information when Mrs. Firestone's own attorney made that statement and that was the way it was relayed——
A. Yes, I did.
Q. —to you. That, in context with the other documents that you had? All right. Did you do any further investigation? Let me show you these documents and see if you recognize that.
A. Yes, I do.
Q. Did that emanate from you?
A. Yes, it did. I made a telephone call.
Q. All right.
A. See, I think I also received something. This is not all the things still.
Q. We will come back to that in just a minute.

Mr. Montgomery: You can mark them for identification.

[219] Mr. Frates: I just wanted you to see them.

Mr. Montgomery: I have seen them.

By Mr. Frates:

Q. Would you refer to that, maybe I'd better have this marked for identification.

(Thereupon, the document referred to was marked Defendant's Exhibit C for identification only.)

By Mr. Frates:

Q. Handing you that document, will you tell the jury what you did or what that states?
A. I wanted to double check in fact who was divorcing whom and to me this wasn't quite clear and I called up our correspondent, Dick Duncan, and I asked him.
Q. Excuse me again. Dick Duncan is the——
A. Miami bureau chief.
Q. —bureau chief?
A. Right. Was at the time.
Q. All right. You don't have the office there at Miami? Well, that is immaterial. Go ahead, you called him and is that a telephone conversation with him?
A. It was a telephone conversation with him, yes.
Q. What were you trying to obtain on that time?
A. I was trying to double check whether it was Mr. [220] Firestone who was divorcing his wife or who instigated this suit, the divorce suit itself, to find out who was divorcing whom. And he clarified for me that it was he was sued against her for divorce and this is what——
Q. You weren't sure?
A. There was a suit, countersuit, suit, countersuit that I wanted to double check who in fact had sued for divorce.

Q. All right. Did you get a reply to that? Did you verify who was suing who?

A. Yes, I did. He told me it was he who had sued for the divorce.

Q. Who was suing who for the divorce?

A. Yes, right.

Q. Miss Nadasdy, I think you have related—but you are the researcher?

A. Right.

Q. Gathering the information, you did not write this story?

A. I did not, no.

Q. But you gathered the information to give it to the writer, is that correct?

A. Yes.

Q. And this is what you were trying to do?

[221] A. Right.

Q. Now may I show you Plaintiff's Exhibit 3, which is the Miami Herald article dated December the 16th. Did you have that?

A. I don't remember it.

Q. You don't recall?

A. I don't recall this, no.

Q. Do you recall having one newspaper article? Do you know which one it was?

A. Yes, I do.

Q. Which one was that?

A. It is the Daily News one. The picture, the big picture.

Q. You remember that from the picture?

A. That I do remember, yes.

Mr. Frates: Mark this for identification.

(Thereupon, the document referred to was marked Defendant's Exhibit D for identification only.)

By Mr. Frates:

Q. I hand you that document and is your name on that?

A. Yes, it is.

Q. And it is in pencil, is it not?

A. No, sir, it is pen.

Q. Well, pen, excuse me. I can't see it from here.

[222] A. Shall I read it?

Q. Was that a reply to an inquiry made by you?

A. Yes, it was.

Q. And what were you asking, and what was the reply?

A. I did ask to find out how long the suit—when the suit was initiated and how long testimony was and the answers, the suit was initiated just over two years ago. Testimony has been taken on and off over a seventeen month period.

Q. Now, I hand you—why don't I get these marked over here and go back over there.

(Thereupon, the document referred to was marked Defendant's Exhibit E for identification only.)

By Mr. Frates:

Q. I show you that document. What is that? Is that a teletype copy off a teletype machine?

A. It is a copy of a recording.

Q. All right. And did you have that?

A. Yes, I did.

Q. You had that document, and did you obtain that information?

A. Yes, I did.

Q. What was that a reply to, some of your inquiries?

[223] A. I think it is to the original query. There were split answers. Not everything came in simultaneously.

Q. That was additional information?

A. This is additional information, yes, it is.

Q. Was that available and did you obtain that information?

A. Yes, I did have it for checking the story, yes.

Q. What date is that , Miss Nadasdy?

A. It is a bit confusing because the printing says December 12th, but the stamp machine which gives the entry, you know, when it was entered for Telexing or for copying is December 16, a.m., 11:54.

Q. Who sent that?

Mr. Montgomery: Let's go ahead and put that in evidence.

Mr. Frates: Why don't we put all these in evidence? We are going to, if you don't have any objection.

The Court: Do you have any objection?

Mr. Montgomery: Let me look at them.

Mr. Frates: You had copies of them. I think it makes it more orderly.

The Court: Let him look at them. Technically it is not your case yet.

Mr. Montgomery: I meant to put this in myself, [224] so I will have no objections to Number E for identification. Let's go on further and I will see those in a minute.

Mr. Frates: We put this one in evidence.

(Thereupon, the document previously marked Defendant's Exhibit E for identification was received in evidence as Defendant's Exhibit Number 2 without objection.)

The Court: All right. Very good. Now I will tell you what confused you about these marks. The

Clerk always puts the identification mark on the top, then of course when it is introduced in evidence and you want to use it right away, he just writes it on there. Later he will attach that to a sheet when he gets a chance to put the stamp and everything It will be down in the lower corner.

All right. So you can know where to look.

Mr. Frates: Okay. All right. Now this, folks, you haven't seen these. Of course these will all be available. We are trying to [225] move along in orderly procedure, but you will have all these available in the jury room.

By Mr. Frates:

Q. You have identified this as Defendant's Exhibit Number 2. Is that a telephone message?

A. Yes, it is.

Q. And——

A. Then it is duplicated.

Q. —then it is duplicated?

A. To the proper people. That is normal routine.

Q. Normal routine, of course——

The Court: Mr. Frates, I don't wish to interrupt you, but I would like to take just a few minutes' recess at this time and then we can resume with this witness. We will take about a twenty minute recess and resume with you at that time.

(Thereupon, a short recess was taken.)

The Court: Are you ready to proceed, gentlemen?

Mr. Frates: Yes, Your Honor.

Mr. Montgomery: Yes, Your Honor.

The Court: Call the jury.

[226] (Thereupon, the jury returned to the Courtroom and the following proceedings were had in their presence and hearing, to-wit:)

The Court: All right, sir.

Mr. Frates: May it please the Court.

By Mr. Frates:

Q. As we recessed, Miss Nadasdy, we were talking about Defendant's Exhibit Number 2. Is that correct, that document I have just handed you?

A. Yes.

Q. Now does that have your name on it?

A. Yes, it does.

Q. And was that in your possession or did that come to you before this story was written or published?

A. It came to me before it was published, yes.

Q. Is that a telephone conversation, a typing of the telephone conversation?

A. Yes, it is.

Q. Is this the way most of the communications are handled with Time and its bureaus, a telephone call comes in, it is transcribed?

A. Yes, it is.

Q. And then it is typed up and comes to the various [227] departments?

A. Right.

Q. Will you read that, please? First, what day was it?

A. The stamp is on——

Q. That is the 12th and 16th?

A. That is the 12th and 16th, right. From Duncan, Miami, to Applegate, from Four, Milestone, Firestone divorce.

Q. Let me ask you one other thing. Was this in answer to some of the queries that you had sent?

A. Yes, it is.

Q. Or called. All right.

A. Russell A. Firestone, Jr., and Mary Alice Firestone, got their divorce in Palm Beach, Friday. Firestone, 41, and Mary Alice, 32, had been trying for a divorce for seventeen months. Russell wanted divorce, she wanted separate maintenance. Judge Knott, James Knott, commented, "According to certain testimony in behalf of the defendant, Russell, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Doctor Freud's hair curl. Other testimony in the plaintiff's behalf would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr." The Judge ruled, "It is [228] abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved." Mary Alice gets custody of the son, Mark Allen, four. She gets $3,000 a month alimony and $750 a month child support. She also gets a $50,000 fee for her lawyer from Firestone. Chasing other details and will update.

Q. Right. Miss Nadasdy, referring to Defendant's Exhibit B for identification which you have referred to, this article?

A. Yes.

Q. The large picture of Mary Alice Firestone?

A. Yes.

Q. What newspaper is that?

A. I think it is the Daily News.

Q. When you say the Daily News, is this the Pahokee Daily News?

A. No, I'm sorry, the New York Daily News.

Q. The New York Daily News. Did you have that document?

A. Yes.

Q. In your file?
A. Yes.

Mr. Frates: Your Honor, may I have the file just a minute?

[229] The Court: Let me take the loose ones out.

Mr. Frates: All right, fine.

By Mr. Frates:

Q. Miss Nadasdy, I have the official Court file here and on your affidavit which is filed here, there is attached a copy of a newspaper. Is this the same one that is Defendant's Exhibit B?

A. Yes, it is.

Q. All right. Thank you. After you compiled this information then what did you do?

A. I am not quite sure of what you mean.

Q. We have talked about the various documents, the telephone conversation, the things that you had done. Now, after you got all that information together, what did you then do?

A. Once the story was written——

Q. Who wrote the story?

A. Mr. Doerner.

Q. Who you have identified as the writer, that is his function?

A. That's right.

Q. Then what did it do, come back to you?

A. The story came back to me in checking copy with a stamp on it.

Q. Again it came back to you as a researcher, is that [230] correct?

A. Right.

Q. And this is Plaintiff's Exhibit Number 5?

A. Yes, that's correct.
Q. That came back to you?
A. That's right.

Mr. Frates: Let me show the jury, if I may.

Mr. Montgomery: Objection, that is not—excuse me. Pardon me, I thought you were looking at something else.

Mr. Frates: Look at it.

Mr. Montgomery: I just told you I made a mistake, Mr. Frates. I beg your most humble pardon, sir.

Mr. Frates: Thank you.

By Mr. Frates:

Q. This came back to you?
A. Yes, indeed.
Q. And you checked it?
A. That's right.
Q. And then what did you do with it?

A. Once I feel that a whole article is all right, then I hand it into the copy desk where they transfer anything that has been written, the pencil parts into a top copy which we called the printer's copy. [231] They check it for, oh, proper punctuation, various other copy desk procedures, just, you know, for the language is correct, the punctuation is all correct.

Q. Where does that go? Does that go back to the writer?

A. No, it does not.

Q. Where does it go?

A. It goes to the printer after all the transfers, all the corrections necessary are made, it goes to the managing editor for one glance.

Q. Who was the managing editor or the senior editor in Milestones when this occurred? Is this Mr. Daniels?

A. This is Mr. Daniels, yes.

Q. So ultimately it went to him?

A. It goes to him, yes.

Q. Would it be accurate to say now in what you had done after the writer had called this story to your attention, Mr. Doerner, that you got the AP dispatch, you called the library, you sent the query to the Miami bureau to Mr. Duncan for additional information, you got his reply at 11:25 and then you got another reply in answer to your queries, you came back and double checked with Duncan about who was suing who?

A. Correct.

Q. And then you gave to Doerner that information, is [232] that correct?

A. Yes, correct.

Q. All right. Now let's go back to the word, "divorce". Was the word "divorce" substantiated by the information that you had in your file?

A. Certainly.

Q. And did you feel in good faith that that was accurate reporting?

A. I certainly did.

Q. I am going to skip over Russell Firestone, Jr., his age, heir to the tire fortune, Mary Alice Firestone, one time school teacher, did you check all of these words?

A. Yes, sir.

Q. From the source material that you had?

A. Correct.

Q. All right. And then on the grounds of adultery, and you have written in extreme cruelty above that. Is that your writing?

A. Yes, it is my writing.

Q. Above, we are referring to Plaintiff's Exhibit 5, adultery and extreme cruelty, after six years of marriage and one son, in West Palm Beach, Florida, the seventeen month trial intermittent produced enough testimony of extramarital adventures on both [233] sides, said the Judge, to make Doctor Freud's hair curl. Now in the news article was the word "adultery" used in that?

Mr. Montgomery: Objection, Your Honor. That is not in evidence, if the Court please.

Mr. Frates: We will offer it in evidence.

Mr. Montgomery: No, sir.

The Court: It isn't in evidence right now?

Mr. Frates: All right, sir, but she has testified and I submit this is cross examination, Your Honor.

The Court: It is cross, but you are asking her now if it appeared in some document which is not in evidence.

Mr. Frates: Let me phrase it again.

By Mr. Frates:

Q. Did the newspaper article that you had in your file use the word "adultery"?

Mr. Montgomery: Objection, Your Honor, same objection. It is not in evidence at this particular time, if the Court please.

The Court: I think I will have to sustain this objection because of course it hasn't been offered and it is not your case yet, so I don't know what the result is going to be, [234] but right at this point I will have to sustain the objection.

Mr. Frates: All right. Well, Your Honor, I don't want to delay it, but in cross examination I would think that I have the right to ask her what source she had.

The Court: Well, you did ask her what source, and this is one of the sources. Now the content of it was never mentioned on direct.

Mr. Frates: All right, sir.

By Mr. Frates:

Q. Did the information that you had in your file confirm the word "adultery"? Was it used?

A. It certainly had.

Q. The AP report which was the initial report, is that correct?

A. Yes, it was.

Q. And did that have "accused of adultery and extreme cruelty"?

A. May I see it?

Q. And Russell Firestone was granted the divorce. First paragraph.

A. Mr. Russell Firestone, yes, granted a divorce Friday from his wife. He had accused—a former school teacher he had accused of adultery and extreme [235] cruelty.

Q. All right. Is it true that you didn't accept that, you wired a query back and wanted to check the grounds further than the AP report?

A. Correct.

Q. And then you got the wire from, I call it wire, folks, I am sure these are telephone conversations that are typed up, you got the answer to that query from Mr. Delaney who told you that the technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery?

A. Correct.

Q. And did you assume this to be true?

A. I certainly did.

Q. And did you believe it to be true?

A. Certainly I did.

Q. Were you satisfied that when he checked with Mrs. Firestone's attorney and was told that, that that was sufficient verification to write the story?

A. I certainly did think so, yes.

Q. Do you still believe that?

A. I still believe that, yes.

Q. And in Mr. Duncan's reply or telephone answer did you have in your resource the source material where Judge [236] Knott commented, according to certain testimony in behalf of the defendant, Russell, extramarital escapades of the plaintiff, who would be Mrs. Firestone, correct, were bizarre and of an amatory nature which would have made Doctor Freud's hair curl?

A. Certainly.

Q. And did you assume that was accurate and that is what the Judge had said?

A. It was in quotation marks. It said exactly that Judge James Knott commented. So I certainly did assume.

Q. And were you satisfied that when he made that statement he was talking about Mrs. Mary Alice Firestone, whose escapades according to the testimony were so bizarre that it would make Doctor Freud's head curl?

A. Yes, sir.

Q. You thought he was talking——

Mr. Montgomery: Your Honor, this is repetitious.

The Court: I think it is somewhat repetitious. You have gone over it before, Mr. Frates.

By Mr. Frates:

Q. Again, you thought it was true?

Mr. Montgomery: Objection. Repetitious.

The Court: Objection sustained.

[237] *By Mr. Frates*:

Q. In addition, well, I think that this might be repetitious, you went back and called——

Mr. Montgomery: Objection. It is repetitious.

By Mr. Frates:

Q. Who was——

Mr. Montgomery: Objection.

The Court: I think you have covered it.

Mr. Frates: I think he is correct in that, Your Honor.

By Mr. Frates:

Q. Then, Miss Nadasdy, this story as shown on Plaintiff's Exhibit 5, in your opinion was accurate and truthful to the best of your ability?

A. It certainly was, yes.

Q. Is that correct? And as you say, you don't know Mary Alice Firestone?

A. I don't know her.

Q. I assume you try to be as accurate as you can humanly possibly be?

A. Very definitely.

Mr. Frates: I have no other questions.

The Court: All right. Is that—I'm sorry, I didn't hear you.

Mr. Frates: I'm sorry, sir, may I ask a [238] technical question?

The Court: Yes.

By Mr. Frates:

Q. This is lawyer talk, did you have any doubts as to the truth and veracity of this article as shown in Plaintiff's Exhibit?

A. I did not.

The Court: Any redirect?

Mr. Montgomery: Yes, may it please the Court. Excuse me, I want to return these exhibits.

The Court: Sure.

Redirect Examination by Mr. Montgomery:

Q. Miss Nadasdy, tell the jury when you were first advised that you were going to be called by the plaintiff in this case. When did you receive your subpoena?

A. My subpoena, last night.

Q. Where?

A. The Sans Souci Restaurant, Flamboyant Room.

Q. That is the bar there, is it not?

A. It is the restaurant.

Mr. Frates: Your Honor, I object.

Mr. Montgomery: Your Honor, I am going to lead [239] up to a foundation.

Mr. Frates: I object to this kind of tactics.

The Court: What are you trying to do?

Mr. Montgomery: If Your Honor please, I want to find out who was there. She has told me three or four names of who was there. I want to ask her about a specific person.

The Court: You can ask her if a person is there. After all, that is legal business, a bar.

By Mr. Montgomery:

Q. About what time?
A. About 11:00.

Mr. Frates: It is a restaurant too, isn't it?
The Court: You can ask her.

By Mr. Montgomery:

Q. Since last night at 11:05 after receiving this subpoena, have you had a conference with the lawyers or their——
A. No.
Q. You have not?
A. No.
Q. Did you have a conference with them since you have been down in Palm Beach County?
A. Naturally.
[240] Q. And where did that conference take place, please?
A. At the hotel where we are staying at.
Q. Who all was there?
A. The three counsellors.
Q. Anyone else?
A. Mr. Dennis.
Q. Mr. Dennis?
A. Cross. This gentleman right out there.
Q. Who is Mr. Dennis Cross? Who is he?
A. Assistant to Mr. Medina.
Q. Assistant to Mr. Medina. Is he from New York?
A. I think so.
Q. I have noticed a kind of an accent from you. Are you from England?
A. No, I am not.
Q. You were born in New York?
A. No, I was not.

Q. Where have you lived, in New York most all your life? Where are you from?
A. I was born in Hungary.
Q. How long have you been in this country?
A. Since January of 1957.
Q. How old are you?
A. I will be twenty-seven in August.
Q. Miss Nadasdy, you were asked a question pertaining to [241] files, and this, that and the other. Do you rely as the researcher for Time magazine on what you read from magazines or newspapers or otherwise?

Mr. Frates: Your Honor, I don't think—I object to this, to the line of questioning. I don't think this is the time for him to re-argue his case. I think he has a right to go and have redirect on matters that were brought out on direct and I don't want to object, but I don't think it would be proper for him to stand up here and get argumentative with the question.

The Court: I don't want him to be argumentative, but I think a discussion on direct about what she relied on, and it shouldn't be phrased in an argumentative way. This is a witness you called. You can ask her further about reliance on things if you wish.

By Mr. Montgomery:

Q. Did you rely or do you rely so far as accuracy is concerned on what you read in other newspapers?
A. No. We use our own files.
Q. Were you ever told by anyone at Time magazine that a retraction had been demanded?
A. No, I did not know that.

[242] Mr. Frates: Your Honor, that has nothing to do with the direct or cross. This is just an attempt at argument.

The Court: Objection sustained. I think that is aside from any cross examination or anything you asked her on direct.

Mr. Montgomery: If I might be heard. I want to know of any subsequent investigation, if any, that she did and the motivating purpose of it and the retraction would be the basis for it.

The Court: Let me say I am going to sustain the objection. I appreciate what you say, but to me that would seem immaterial. Once the thing is published, then the die is cast, as I see it, and what took place after other than a retraction which she knows nothing about would make no difference.

Mr. Montgomery: Thank you.

The Court: That is the reason for sustaining the objection.

Mr. Montgomery: Thank you, Your Honor.

By Mr. Montgomery:

Q. I hand you plaintiff's exhibit in evidence Number 6. Did you have any files for Russell Firestone and [243] Mrs. Firestone at your disposal, that is, more files or other type of file at that time?

A. May I ask a question?

Q. No, ma'am, you may answer questions.

A. But I would like to——

Q. Do you understand the question?

A. Not quite.

Q. All right. I will rephrase it. Did you have before you any Time, Inc., files pertaining to Russell Firestone and Mrs. Firestone, what they had done in the past, who they were, et cetera?

A. For the use of publication?

Q. Yes.

A. Yes.

Q. Now this article, Plaintiff's Exhibit Number 6, which is marked out, says, "Need detailed information as all morgue material on the case and the Firestones themselves has been lost." Is that true?

A. It was at the time I sent the query, though it was not true at the time that I finished researching the story.

A. Yes.

Q. You all found them?

Q. When did you find them?

A. Saturday.

[244] Q. What time Saturday?

A. I don't remember.

Q. Before or after the communique from Miami?

A. I don't remember.

Q. Now also when you wrote down, I believe you said in that material there where it is marked out——

Mr. Frates: Your Honor, again I don't want to object, but he is just going back. He called this witness and he is just going back and re-hashing everything he went over before, Your Honor, and I don't think this is proper redirect. He is really cross examing the witness.

Mr. Montgomery: I didn't even finish my question.

Mr. Frates: I know that, but I think the whole tenor of it——

The Court: I will let him finish his question before I can rule. Finish your question. Don't answer it until I rule, please.

The Witness: All right.

By Mr. Montgomery:

Q. At the bottom of that inquiry that you wrote to the Miami bureau, at the last sentence I believe on that you said, "Need usable quotes." What did you mean by that?

[245] The Court: Don't answer.

Mr. Frates: That is the same thing, Your Honor.

The Court: You have no objection?

Mr. Frates: I can't take more time, okay, so I will let it go.

The Court: You may answer it.

By Mr. Montgomery:

Q. What did you mean, you need usable quotes?

A. Anything that we can put into the article for the sake of the article.

Q. Of interest?

A. Of interest, yes.

Q. Of amusing interest to the readers?

A. Just interest of any sort.

Q. And as a matter of fact, you extracted from this and of all the material you had at Page 77, you quoted from the Judge's order, the quotation, testimony of such a nature to make Doctor Freud's hair curl. Did you choose that language?

A. I am not an editor.

Mr. Frates: I object. She has already testified that she did not write this article.

The Court: I will sustain the objection. She didn't write the article.

[246] Mr. Frates: Again, we are just rehashing.

The Court: I have sustained the objection. I think you are correct.

Mr. Montgomery: My question was, is not the writing of the article, but did she choose those words for the article? In other words, give it to whoever was going to write it. The rough draft or otherwise. I don't know how they work it.

The Court: She testified she gave all this information. I think it is going over. You are on redirect.

By Mr. Montgomery:

Q. Once you got this information, did you write out any proposed copy?

A. I do not.

Q. Do you synopsize in any way this particular information that you disseminated?

A. I do not.

Q. But once you give it to the writer it comes back to you to check for accuracy, is that correct?

A. Correct.

Q. So you see it how many times? In other words, the article itself that is ultimately published? Before it goes to publication?

[247] A. I see, in this case the edited version, then it is made into checking copy and that is it.

Q. What is the edited version?

A. The edited version is once the senior editor has seen the writer's version, which I do not see. It is not typed before, so he writes it, he sends it to the senior editor. I don't see any of this yet at all. Once the senior editor has edited, amended, whatever he does, edited the story, then it is typed and I get a copy of it. That is the first time that I have seen it.

Q. Did you have and submit to your editor the information that Judge Knott had discounted much of the testimony——

Mr. Frates: Your Honor, again, this is using argumentative cross examination.

The Court: Objection sustained. I think she has already told us all that she gave him. Objection sustained.

By Mr. Montgomery:

Q. Now you were asked, pertaining to the first, I believe it was the——

A. Are you looking for this by any chance?

Q. May I look? Yes, I am looking for something particularly. Yes. Defendant's Exhibit Number 2 that you referred to on cross examination by Mr. Frates [248] where it says in here, I am looking down here, the Judge ruled. What did that mean to you?

A. It means to me that the judge passed sentence.

Q. All right. And what does it say that the Judge ruled in that Defendant's Exhibit Number 2?

A. "It is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication and that the marriage should be dissolved."

Q. Close quotes?

A. Close of quotes.

Q. Then consequently you gave to this editorial writer——

Mr. Frates: Your Honor, this again——

Mr. Montgomery: Withdraw the question.

Mr. Frates: Now, I object.

The Court: I think this is repetitious, Mr. Montgomery.

Mr. Montgomery: May I be heard just briefly?

The Court: Yes.

Mr. Montgomery: Mr. Frates, of course the very nature of the fact, and I called her as a witness, I know I have to vouch for her credibility and all the legal technicalities that go with it, but he did cross examine her in detail on that particular matter and [249] consequently on redirect examination I think that I can go back in, if nothing more than to enlarge her testimony and to show——

The Court: All right. I will see about it, Mr. Frates.

Mr. Frates: I am not trying to rely on technicalities. I don't think he ought to go first and put her on and then come back——

The Court: And have her say the same thing again?

Is that what you are objecting to?

Mr. Frates: That's right, that is exactly my objection.

Mr. Montgomery: That was not even admitted in evidence.

The Court: I will let you go ahead and ask this question. Don't all talk at once. Go ahead. I will overrule his objection.

Mr. Montgomery: The reason I wanted to add that, I am going to ask her some more questions pertaining to that, if the Court allows me, because it was not my direct examination.

The Court: All right. Go ahead.

Mr. Montgomery: Thank you.

By Mr. Montgomery:

Q. Now you told us, what were your words about what it [250] meant to you when it said the Judge ruled? What did rule mean to you?

A. The Judge passed sentence.

Q. He found that, that was his finding, that was his judgment, so to speak?

Mr. Frates: Your Honor, here we go.

The Court: Objection sustained.

Mr. Montgomery: Withdraw. It is leading.

The Court: Let her testify. Don't you suggest what she should say.

By Mr. Montgomery:

Q. Did you give that to your editorial writer?

A. This file?

Q. Yes, ma'am.

A. Yes, I did.

Q. He had possession of it?

Mr. Frates: Your Honor, again——

The Witness: Yes, he did.

Mr. Frates: I apologize for standing up, but we have been through every bit of this before.

The Court: I think so.

Mr. Montgomery: I didn't finish my question.

The Court: I know, but I think you brought this out on direct. I think he crossed examined [251] her about it. Now, why have her say it again?

Mr. Montgomery: Your Honor, I didn't even have an opportunity. I have never—that was not in evidence when I had her on the direct examination in the first place. I want to ask beside that man, who else? I didn't even finish my question.

The Court: All right. Go ahead. Let him finish his question. Let's see what it is.

By Mr. Montgomery:

Q. You said the editorial writer, was that Mr. Doerner?

A. Mr. Doerner, yes.

Q. He had that. Did anyone else see that to pass upon the ultimate article that was published in Time to your knowledge?

A. I think the senior editor gets it.

Q. Who might that be?

A. Mr. Gus Daniels.

Q. Who is Mr. MacFarland? Is there a fellow by the name of Mr. MacFarland in your party here?

A. I don't know Mr. MacFarland.

Q. So there were, before the article was ultimately published in Time magazine, you had the Judge's ruling?

[252] A. I had this file, yes.

Q. And you gave it to the editor?

A. They get it automatically.

Q. Now before the final one is made, it is given to the—what do you call the second man? I forgot. You give it to the first man, that is the writer?

A. I give it to the writer, yes.

Q. Doerner?

A. All material goes to the writer.

Q. And Doerner writes it out?

A. Writes the story, yes.

Q. Then Doerner gives it to Daniels, is that correct? Who is the senior editor.

A. Mr. Daniels, yes.

Q. Daniels?

A. He gives the story to——

Q. Does Mr. Daniels get this also, is that correct?

A. You mean all the research?

Q. Yes, all the material.

A. Not always.

Q. Do you know whether he got it in this case?

A. He certainly gets all the files. He doesn't necessary get all the newspaper clips.

Q. Then——

A. Or books or what have you.

[253] Q. Then it would ultimately come back to you to recheck for accuracy, correct?

A. Correct.

Q. Now you said you found the Firestone files and they were sent up to you. Did those files reflect that Mrs. Mary Alice Firestone had a case, a libel case, pending against Life magazine at this particular time?

A. No. The files didn't reflect that.

Q. I beg pardon?

A. No.

Q. No, you don't remember, or no, that it did not?

A. May I hear the question again?

Q. Yes, ma'am. Of the files that you had pertaining to the Firestones that you say were ultimately found, did those files have in it an indication or knowledge to you, as you remember, whether or not Mrs. Mary Alice Firestone had filed suit against Time before?

A. No, they did not. But I did know.

Q. You did know. How long had you had that information, Miss Nadasdy?

A. While I was trying to obtain the files.

Q. How did you discover that information?

A. Because the files were signed out the legal department.

Q. And what was in that file or what was the information that you got? What was in that file?

[254] Mr. Frates: Your Honor, are we going to try that case? I object to this and I don't think it is material or relevant to the issues.

The Court: Objection sustained.

Mr. Montgomery: May I be heard, Your Honor?

The Court: Yes.

Mr. Montgomery: Motive. Malice and motive, if the Court please.

The Court: Objection sustained.

Mr. Frates: Thank you, sir.

By Mr. Montgomery:

Q. May I ask you when you made the determination about this previous case filed by Mrs. Firestone against Time, Inc.?

A. When?

Q. Yes, ma'am.

A. I found out on Saturday when I got the files.

Q. Miss Nadasdy——

Mr. Frates: I hope this is going to be a question. I want to object to it because I don't think we need a closing argument here.

The Court: Mr. Frates, I can't possibly tell you what he is going to ask.

Mr. Frates: I know that, sir.

[255] The Court: So be quiet and let's find out.

Mr. Montgomery: May I proceed with the question, Your Honor?

The Court: Go ahead and ask the question. I told him to sit down. Go ahead.

By Mr. Montgomery:

Q. If you had the files before you when this was marked out on plaintiff's exhibit—excuse me, Plaintiff's Exhibit Number 6, didn't the files reflect the birthdate of Mr. Russel Firestone?

A. May I see all the files?

Q. I am talking about Plaintiff's Exhibit Number 6.

A. I sent the query, I did not have the folders, but subsequently I received them.

Q. I see. Why was the name of the child important?

A. Because it is usually customary to, in a divorce item, to put in age, children, how many, sometimes their names, and you simply get it as a precautionary method in case the editor would like to put it in, since closing is on Saturday and obviously Friday evening you will try to get all the information you can.

Q. And the fact that they had a child and his name was important to this article, is that correct?

A. Correct.

[256] Mr. Montgomery: That is all. Thank you.

The Court: Anything else?

Mr. Frates: Just one question.

Recross Examination by Mr. Frates:

Q. Miss Nadasy, Mr. Montgomery asked you about your accent.

A. Yes.

Q. You are from Hungary?

A. Yes, I am.

Q. You left Hungary when?

A. During and after the revolution.

Q. Were you in jail there?

A. Yes, I was.

Q. And you left that country and came to this country, didn't you?

A. Yes, I did.

Q. And went to college?

A. Yes.

The Court: Is that all?

Mr. Montgomery: I have no further questions.

The Court: Thank you very much. You can step down.

(Witness excused.)

Mr. Montgomery: Your Honor, may I have just a [257] minute before I go any further?

The Court: Yes.

Mr. Montgomery: Call George G. Daniels.

THEREUPON, GEORGE G. DANIELS, called as a witness for and in behalf of the plaintiff, after being by the Clerk of the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

Direct Examination by Mr. Montgomery:

Q. Would you state your name, please?

A. George G. Daniels.

Q. Where do you live, Mr. Daniels?

A. In Greenwich, Connecticut.

Q. How long have you been here in Palm Beach County?

A. Since Sunday.

Q. Did you come down here for the purpose of testifying at this trial on behalf of Time?

A. I did, yes, sir.

Q. What, in 1967, tell me now, how are you connected with Time, if you are at the present time?

A. I am a senior editor.

Q. And was that your position in December and January, [258] December of '67 and January of '68?

A. Yes, sir.

Q. Was that your position on September the 10th of 1968?

A. Yes.

Q. Did you file an affidavit in this particular case in behalf of your employer, Time, Inc.?

A. I did.

Q. Will you refresh your recollection with that document I have just handed you, please?

A. Yes, sir.

Q. It it true?

A. I believe so, sir.

Q. Now, Mr. Daniels, let me ask you this, were you the man or the person completely in charge, in other words over everybody, that is, Miss Nadasdy, the writer, Duncan, and everybody pertaining to this article in Time magazine?

A. Subject to the managing editor's detail, I was.

Q. Was the managing editor there this Saturday, did you submit this to him?

A. There was a managing editor and assistant managing editor.

Q. But you were in control, were you not?

A. I was in operational control, yes, sir.

Mr. Montgomery: Your Honor, I'd like to call [259] this gentleman, by reason of the fact that he had the control of this particular article, under the adverse rule if the Court please, just like if it was a manager of a store, or something of that nature.

Mr. Frates: Your Honor, I have no objection to him asking any questions that are relevant and material to this case, of Mr. Daniels. It is perfectly all right.

The Court: Your request is granted. You are entitled to.

Mr. Montgomery: Thank you very much.

The Court: Do you wish me to explain to the jury what the adverse witness rule is?

Mr. Montgomery: If you would, please.

The Court: Under the rules of civil procedure, one party may call the opposing party or, if the opposing party is a corporation such as this, a managing agent of the opposing party, as we call an adverse witness, and put them on and cross examine them and under the rule they do not vouch for that testimony. In other words, he is cross-examining this witness because he is an adverse witness. He is the managing agent [260] of the defendant. All right. Does that explanation suffice?

Mr. Frates: Yes, Your Honor.

The Court: Go ahead now, Mr. Montgomery.

By Mr. Montgomery:

Q. Who, Mr. Daniels, was in charge of obtaining the accurate and correct and truthful information pertaining to the divorce between Mrs. Firestone and Mr. Firestone in Palm Beach County?

A. Who was responsible in Palm Beach County?

Q. Yes, sir, who did you direct to get that information.

A. Our Miami bureau.

Q. Who in your Miami bureau did you so direct?

A. Dick Duncan.

Q. Who did Dick Duncan thereafter direct?

A. I believe that Mr. Duncan did some of the work himself and Bob Delaney did some of the work as well. We got files from both of them.

Q. Who is Bob Delaney?

A. He is our stringer.

Q. What is a stringer?

A. A stringer is somebody who works for the magazine part-time, who works for another organization basically and who assists us and who works part-time on specific assignments, generally.

[261] Q. Was he being paid, Mr. Delaney, by you for the work that you wanted him to do on this particular article?

A. Yes, sir.

Q. How much was he paid?

A. I don't know.

Q. You don't pay Mr. Delaney presently what you paid him back there in 1967, do you?

A. I don't know, sir.

Mr. Frates: Now, Your Honor——

The Court: He said he doesn't know.

By Mr. Montgomery:

Q. Let me ask you this, to your knowledge is now Mr. Delaney on a guarantee by Time, Inc?

A. I honestly don't know. That is not my function. I'm sorry.

Q. You had nothing to do with those arrangements so far as that is concerned?

A. No, sir.

Q. In noticing your particular affidavit here, you evidently had conversations prior to this affidavit of September the 10th of 1968, both with Mr. Duncan and with Mr. Delaney?

A. I don't understand.

Q. Did you have any conversations prior to making that [262] affidavit with Mr. Duncan and Mr. Delaney?

A. No, sir.

Q. You mention in that affidavit that Mr. Duncan and Mr. Delaney checked the Court files in this case prior to this article being published by Time, Inc. Is that true?

A. It was my understanding that the article was adequately checked.

Q. No, sir. That was not my question, sir. My question was, did Mr. Duncan and Mr. Delaney check the Court

files in this Courthouse in Palm Beach County, Florida, prior to the time that Time, Inc., published this article?

A. That was my assumption.

Q. That was your assumption. Upon what did you make that assumption?

A. On the files that we got from Mr. Duncan and Mr. Delaney.

Q. Then you thought then that Mr. Duncan and Mr. Delaney actually had checked the Court files?

A. I thought that they, to be honest with you, I thought that what had happened was, the article had been adequately checked. Now if this included checking the Court files, that is apparently what I must have thought.

[263] Q. Let's read from your affidavit here. From dispatches from Duncan and Delaney and telephone conversations with them, we learned that they had checked the Court file in connection with Mary Alice Firestone's divorce proceedings and had interviewed her attorney, Joseph D. Farish, and Judge Knott, before whom the divorce proceedings had been held.

Did you swear to that, sir?

A. I did, sir, yes, sir.

Q. Is that true?

A. I believe it to be true, yes, sir.

Q. Did you know it to be true?

A. I believe it to be true. That is all I can say.

Q. Did you know it to be true at the time you signed that affidavit, sir?

A. I believed it to be true at the time I signed it.

Q. That is not my question. Did you know it to be true or false?

A. I thought it to be true.

Q. Yes, sir. So you put something in that affidavit and swore to it just that you thought and not with any knowledge, is that correct?

A. Knowledge, yes, I believed that I had the knowledge to think it was true.

Q. Where did you get that knowledge, that they had [264] checked the Court file?

A. From the files that we received from these gentlemen.

Q. What files?

A. The files at the time we wrote the article.

Q. What was included in those files?

A. Approaching the Judge, approach from the lawyer.

Q. Well, let me just—as senior editor you had all of this before you before you okayed the article?

A. I don't know what that is.

Q. Let's just look at them for a few minutes. Here is your magazine.

Mr. Frates: Judge, let's give him a Daily News, too.

The Court: How about, maybe he ought to have them all.

Mr. Montgomery: Anything.

Mr. D'Aiuto: That one he has in his hand has not been admitted in evidence.

Mr. Frates: You called him about the things he checked in the file.

Mr. D'Aiuto: That is not evidence, Your Honor.

The Court: I understand that. The question now is whether he had all these things before him.

Mr. Montgomery: Yes, sir, I want everything he [265] had before him. If you have anything else that he had before him, you can show it to him.

Mr. Frates: We don't need this kind of by-play. We can just proceed with the trial.

The Court: You know, conversations between lawyers are very unimpressive to the jury.

The Witness: Sir, to the best of my recollection, yes, sir.

By Mr. Montgomery:

Q. All right, sir. What quotations are in those? You may take another minute, pertaining to the actual rulings or findings of the Court upon which it led you to believe, and you can just identify them. We will go into them in just a minute, that led you to the belief that the Court files actually had been checked by your employees.

A. The Judge ruled——

The Court: Excuse me a minute. Do you want him to just make a note of them?

Mr. Montgomery: Yes, sir, to identify them.

The Witness: This piece here——

By Mr. Montgomery:

Q. Would you just put it over here?

A. Yes, sir.

[266] The Court: That is right. They will get them and then we can question him about particular ones.

The Witness: These two pieces.

By Mr. Montgomery:

Q. All right, sir. Then for the record here you are referring to Plaintiff's Exhibit Number 4 and Defendant's Exhibit Number 2, is that correct?

A. Yes. There may be some others.

Q. I want you to get them, please, if you would.

The Court: Take your time and look through and be certain, sir.

The Witness: All right. Okay.

By Mr. Montgomery:

Q. All right, sir, is this——

A. Yes, and these two little pieces.

Q. These two little pieces right here?

A. Yes. One, the telephone message and the other is an additional dispatch.

Q. All right, sir. Now where does it say in those particular items that you have given us that Duncan and Delaney had checked the Court files?

A. It doesn't say that they had checked the Court files specifically here, but the inference is throughout.

Q. In your affidavit you say—let me ask you this, I [267] withdraw that, please. Did you have any telephone conversations with Mr. Delaney or Mr. Duncan? Did you have any personal telephone conversations with Mr. Duncan or Mr. Delaney?

A. No, sir.

Q. But you had those dispatches?

A. I beg pardon?

Q. But you had those dispatches?

A. Yes, I did.

Q. Did you subsequently learn that they hadn't checked the Court file?

A. Sir, I don't think I have learned that.

Q. Do you know today, even today, whether or not they made the——

A. No.

Q. Did you make any subsequent investigation after this article was published as to whether or not they ever made any check of the actual Court files in Palm Beach County, Florida?

A. I don't recollect.

Q. Your president of your corporation, then president Mr. Linen, says that the information for the article came from the Clerk of the Fifteenth Judicial Circuit in and for

Palm Beach County, Florida, Palm Beach County Courthouse.

[268] Mr. Frates: Excuse me. Your Honor, I wasn't going to object, but he is reading that wrong. It says indirectly——

The Court: Read it exactly.

Mr. Montgomery: I'm sorry, Your Honor, I was trying to find it here and trying to save time.

The Court: All right. You read it exactly.

By Mr. Montgomery:

Q. Interrogatory Number 26 to the president of your corporation, which was answered under oath by him on the 23rd of August, 1968, he was asked these particular questions, Interrogatory Number 26, I will let you read it. Did you obtain any information on which you relied in making the publication concerning plaintiff from any public records? Interrogatory Number 26.

A. Yes.

Q. All right, sir.

Mr. Frates: Your Honor, he asked a question and he misstated what was said in there. Now I ask that that answer be read to the jury.

The Court: He is going to read the answer, I assume.

Mr. Montgomery: I am going to read the answer. Did I read the question properly this time, [269] I mean the Interrogatory.

Mr. Frates: Yes.

By Mr. Montgomery:

Q. Answer, yes, indirectly. The next question, Interrogatory Number 27, it was directed to the president of Time, if so, state, a, the governmental agency that main-

tains the records. Answer, Clerk of the Fifteenth Judicial —excuse me. Clerk of the Fifteenth Circuit Court in and for Palm Beach County, Florida.

B, the address of the office in which the records are maintained. Answer, Palm Beach County Courthouse, West Palm Beach, Florida. C, the description by date, subject or filing number of the records consulted. Answer, decision of James R. Knott, Circuit Judge, Case number 64-C-2790-C, filed in the minutes of the Circuit Court, number 136, at page 313 through 319.

Now, my question to you, sir, was Mr. Linen when he answered those Interrogatories correct or incorrect?

A. Sir, I don't know.

Q. As senior editor did you have anything to do with the checking of the accuracy of this particular article?

A. Yes, sir, because I am in charge of the section. Yes, I did. I am responsible for it.

[270] Q. As senior editor was the order or finding of fact and the law by the Judge important to you, sir?

A. I don't understand the question, sir.

Q. Was it important to you to know the contents of the ruling of the Judge?

A. Yes.

Q. Were you so advised of what the Judge had ruled by those dispatches?

A. Yes, I believe so.

Q. Did you have any dispatch from any of your employees or reporters or correspondents that the Judge had ruled that Mrs. Firestone, Mrs. Mary Alice Firestone, had been found guilty of adultery?

A. Yes, I believe so. Let me take a look here.

Q. Please look.

A. No, I'm sorry. The inference was there, but I don't think it was specifically said.

Q. I didn't ask about inference. I said did you have any dispatch or correspondence or any other writer, reporter, correspondent or any agent or servant that the Judge had ruled Mary Alice Firestone had been found guilty of adultery? Do you have any information to that?

A. We had a report that indeed that was the case, yes.

Q. From your correspondents?

A. Yes.

[271] Q. Please read it for the Court.

A. Technical grounds for divorce according to——

Mr. Frates: Wait a minute, Counsel

The Court: Let him read the whole thing.

Mr. Frates: May we ask Mr. Montgomery to please stand back and let Mr. Daniels answer the question?

The Court: All right. You want him to read this, don't you, Mr. Montgomery? He is referring to, or do you want him to read it?

Mr. Montgomery: Yes, I want him to read it.

The Court: Go ahead and read it.

The Witness: The technical grounds for divorce according to Joseph Farish, Junior, attorney for Mary Alice Firestone, were given as extreme cruelty and adultery.

By Mr. Montgomery:

Q. Read the next line, please.

A. The Judge however in a quite colorful opinion said that neither——

Q. Are there any quotation marks there, sir?

A. Yes, I am getting to them. "Has shown the least susceptibility to domestication and that the marriage should be dissolved."

Q. All right, sir. Now do you read that as that the [272] Judge ruled or found that Mrs. Mary Alice Fire-

stone had been guilty of adultery? Is that your interpretation of it, sir?

A. The interpretation is if her lawyer says so, her lawyer knows what the grounds were.

Q. I am going to ask you this question, Mr. Daniels, would you publish something in Time Magazine for over three million readers based upon what some lawyer told you outside of the courtroom?

A. We were satisfied that was an accurate report.

Q. Would you rely on that, sir?

A. We did. It was an accurate report. We assumed this was the case.

Q. In other words, if a lawyer tells you something outside of the courtroom and not in the record you would publish it in Time magazine, is that correct, sir?

A. We went on to check further, I believe.

Q. Why did you check further?

A. Now wait a second. What we were checking was the suit was initiated, testimony had been taken off and on, this was 11:25, 1:25, p.m. The 1:25 p.m., was a technical ground for divorce according to Joseph Farish and that was the final word on that particular part of the item, I believe. Then we went on to check other aspects of it.

[273] Q. You continued to check it?

A. Other aspects of it. How long, for example, it was on.

Q. You had Defendant's Exhibit Number 6 that is marked Applegate. You had that before you, did you not, when you were finally editing the article?

A. No, sir, this was sent the evening before. This was sent when we first scheduled the item. This was sent December 15th.

Q. I said before finally approving that article you told me everything that you had before you, you had that before you, didn't you?

A. Yes, sir.

Q. And what did your researcher tell these people of yours in Miami to do, so far as getting the grounds for divorce?

A. Need the grounds on which it was granted and the words of the Judge. When were they married, need birth dates, both parties.

Q. You don't have to read it. All I am just asking you as far as the grounds for divorce. Did you not direct under your supervision and control your researcher to get precisely the grounds for divorce in the words of the Judge? Did you not tell them that, sir?

A. Yes, sir.

Q. Did you not direct them to do that?

[274] A. Yes, sir.

Q. Did you not have it?

A. We believed that we had it.

Q. That is right. You didn't ask them to get the grounds of divorce upon the words of a lawyer or any words of the lawyer, did you, sir?

A. We believe that we had been given the correct grounds. That is all I can tell you, sir.

Q. Do you believe it now?

A. Yes, sir.

Q. Do you believe that Mrs. Firestone was found guilty of adultery now?

A. I have read the Judge's opinion. I believe so, yes, sir.

Q. Did you ever inquire of your legal department who is in the same building with you that a woman in the State of Florida who is found guilty of adultery—I haven't finished the question.

Mr. Frates: Your Honor——

The Court: I will take care of this in just a minute. Go ahead and finish the question.

By Mr. Montgomery:

Q. Have you ever discussed with your legal department before publication or after publication anything pertaining to the Florida law that a woman found guilty [275] of adultery in a divorce case may not receive alimony?

The Court: Don't answer the question yet. All right. State your objection.

Mr. Frates: Your Honor, I object on the grounds that this is nothing but pure argument. The manner in which it was—it is a matter of law, domestication or lack of domestication is not a ground for divorce in the State of Florida and this is purely and simply an argument and it is not material and relevant and as Your Honor has ruled throughout that this is going to be a matter of law that Your Honor has to interpret the legal effect of this decree. Mr. Daniels has answered the question. He felt it was. And that was as senior editor of Time, Inc. Anything else I'd say would be repetitious so I am going to stop.

The Court: Isn't it argument now, Mr. Montgomery, that you want to make?

Mr. Montgomery: No, sir. If Your Honor please, I request the Court again so that these questions will not have to be asked, to take judicial notice of that particular Florida Statute if the Court please and then [276] we can avoid a great deal of this. You can take judicial notice at any time if the Court please of that particular Florida Statute with its correct and proper provisions.

Mr. Frates: Your Honor, what counsel apparently is trying to interpret is the legal effect of this document. There are no grounds in this

basis. I don't want to argue that, but this is a matter of law and depending upon what Your Honor rules, then it is argument and that is all he is doing and of course I think that his manner is over-aggressive, but I suppose he is entitled to do that if he wishes.

The Court: I think that is argument, Mr. Montgomery. I can't get it out of my mind that it isn't therefore I am going to sustain the objection.

Mr. Frates: Your Honor, may we ask Your Honor to instruct the jury to disregard this statement?

The Court: I don't believe he answered the question. I instructed him not to answer it until I ruled on your objection. He [277] didn't answer it.

Mr. Frates: The trouble, Your Honor, with a question you don't have to have an answer sometimes if you ask the question.

The Court: I usually instruct the jury that at the end about they are not to speculate what an answer might have been if an objection is sustained.

Mr. Montgomery: Your Honor, may I be heard just briefly along these lines before your final ruling?

The Court: Yes.

Mr. Montgomery: I wanted to show malice by reason——

Mr. Frates: I——

The Court: Just a moment. Ladies and gentlemen of the jury, you better retire to the jury room just a moment.

Mr. Frates: Your Honor, it is noon. Should we recess now?

Mr. Montgomery: Excuse me, Mr. Frates. The jury is going out and may we address our remarks to the bench?

The Court: Address them to me.

Mr. Frates: I thought I was, Your Honor, but Mr. [278] Montgomery apparently felt I wasn't.

(Thereupon, the jury retired from the Courtroom and the following proceedings were had in their absence, to-wit:)

The Court: Let me address both of you a little bit now. There is nothing more annoying to the Court, and I am telling you this, than to have two lawyers bickering with each other because what I am trying to do, and it isn't easy, and which probably I don't do all the time. I tried to make a proper ruling and it is hard and difficult and there seems to be a lot of feeling among the lawyers. Each of you are very convinced of the merits of your case and you are expected to prosecute vigorously and make objections when you feel you are entitled to them, but this feeling of personal animosity has no place in a lawsuit.

Mr. Montgomery: I agree with Mr. Frates.

Mr. Frates: I don't know, at least personally, I don't feel that I have exhibited any of it. I don't feel it. I have objected to I think some of his extreme discourteous [279] manner with the witnesses. I direct those remarks to Your Honor and not to Mr. Montgomery.

The Court: Well, now I will hear you on this, but I will tell you what my feelings are to begin with. I feel that to a great extent you have of course brought out some pertinent facts from this witness and exactly what he did and why he did it, which is proper and all, but isn't it argument to say now that did you really say so and so, or do you feel that that was sufficient or something. That is what you are going to argue to the jury.

Mr. Montgomery: No, sir, and the reason, if I might state the reason, why that is proper if the the Court please. Malice on the part of Time, Inc., that knows now that has been legally advised now about the woman that cannot receive alimony if found guilty of adultery by our statutes, and they never have retracted it. That is malice when they know about it and know it is untrue and fail to do anything about it with the exception of a damage suit.

[280] The Court: Now you are making a real good argument, but you don't argue this to the witness. See what I mean?

Mr. Montgomery: Yes, sir, that is the reason I asked the Court, and begged the Court at this particular time to take judicial notice of that, so we don't have to worry about that particular aspect any more. It is not a question of fact, if the Court please. It is a question of law.

The Court: But what you want to bring out from the witnesses——

Mr. Montgomery: Does he know that now. Does he know that now and if he knows it now why didn't he retract the article?

Mr. Frates: Your Honor——

The Court: He wants me to charge them on the statute now.

Mr. Frates: I think that, Your Honor, that that is immaterial, but I think that if Your Honor were going to charge that, that Your Honor will have to charge that whatever the term they are using, being domesticated, is not a ground for divorce in the State of Florida. The article says on grounds of [281] extreme cruelty and adultery, and we submit that is exactly what that decree says

and that there is no ground for divorce for that. Now, if Your Honor is going to instruct them on that, which I don't think is material or relevant to it, Your Honor——

The Court: Well, they have got finally if we are going to submit it to the jury at all, they have got to know that.

Mr. Frates: They have got to know the grounds, yes, sir, for divorce in the State of Florida and there are specific grounds as we all know so they just want half of this case.

The Court: No, I don't think so. Now what do you intend to bring out in this witness just generally speaking?

Mr. Montgomery: Your Honor, I have several notes, I will probably be on another ten or fifteen minutes worth of testimony, but a lot depends on his answers, Judge. I have never talked to this man before. I don't know what he is going to say.

The Court: All I am trying to do is keep the [282] argument out of it. Now I think that you have—when he answers, then I think you ask him something else which is argumentative sometimes which is something you are going to argue to the jury.

Mr. Montgomery: I apologize, Judge.

The Court: I think what I will do is I will recess at this time and resume this witness after lunch.

Mr. Frates: Of course, Your Honor, I think he has asked this question. Of course, we objected to this specific one, but I know you can't award alimony if adultery——.

Well, Your Honor——

The Court: I didn't hear it. Was that the question?

Mr. Montgomery: They have the legal department there, whether or not they made any effort to check the legality so far as alimony and child support, would that not, if Mrs. Firestone got over $3,750 a month wouldn't that put a person on notice as if she was an adulteress, how in the world, why wouldn't they ask their legal department? This is a line of questioning and now that they know, [283] now that they know that an adulterous wife cannot receive alimony in the State of Florida, they never retracted.

The Court: Well, I will tell you what I think. I think you can ask him about did they check the legal department on the statutes of this case. I think that is perfectly all right. I think if he says yes, you can ask him did he follow their advice and so forth. If he says no, of course that is the end of checking with the legal department. You can ask him about retractions, if they ever retracted.

Mr. Frates: Your Honor, there is no question that the article was not retracted.

The Court: But he can ask him questions about did they consider it?

Mr. Frates: But, Your Honor, what counsel has done frequently is he has asked the question in an argumentative manner, has really tried to argue the case and this is what he is doing right now on both these witnesses.

The Court: He can cross examine this witness.

Mr. Frates: Your Honor, he can cross examine, but I think there are certain rules a [284] lawyer ought to abide by and one of them is to show some deference to a witness. He can vigorously cross examine, but he is not doing that. He is arguing every witness.

The Court: I thought if he got into some argument here which lawyers do, and that is no disgrace, I have just ruled that he did, that is all. He probably doesn't think he did, but I ruled against him, so I am just going to say that of course you can ask him if he consulted their legal department before and I don't know what his answer is going to be. If not, that is some factor you are going to argue to the jury.

Mr. Montgomery: Your Honor, at this time because it is the most appropriate time may I request again that the Court, not in the words of the statute, but just take judicial notice of the fact that the legislature forbids adulterous wife from receiving alimony in this state.

The Court: I know that. I take notice of it. Do you want me to tell the jury that?

Mr. Montgomery: I just want you to take judicial notice of it so I can ask you the question [285] or, as short as you can, to let them know because they have gone through a day and a half here and they still, I don't think, know it. And they can use it as far as their deliberations are concerned and it is a judicial fact, just like whatever the time the sun rose this morning.

Mr. Frates: Your Honor, I suppose you could ask them, although I don't think it is material or relevant. If the answer is no I don't think there is any legal implication on them to run and check with the legal department every item.

The Court: That is a matter of argument.

Mr. Frates: Maybe it would be, but this goes back to the crux of it and I submit Your Honor is going to have to as a matter of law rule on the law of that final decree or that final judgment. Now the only quote that they are objecting to is on

grounds of extreme cruelty and adultery. That decree says that, Your Honor.

The Court: This isn't bearing on his question. He wants me to advise them of this law now and I held that if it was given to the jury [286] it should be given along with the instructions. You said also that by the same token they should be advised that lack of domestication was not a ground for divorce in Florida. This may be true too. Maybe they should be, and I don't know, but I think all these things shoud be done on the Court's charge to the jury and you can ask him about whether he consulted with the legal department. All these are facts. Then, depending on the answer, what you store up for argument to the jury. That is the time to argue.

Mr. Montgomery: Thank you.

The Court: I am going to have to recess and I have a meeting today, so it will be about a quarter to two before I can get back here.

Mr. Montgomery: That is good. I need the time, frankly.

Mr. Frates: Your Honor, may I ask counsel without attempting to interfere with his strategy how many more witnesses he is going to call, how long he is going to be, so it would be——

Mr. Montgomery: I probably will call all of the [287] witnesses after a decision tonight. I indicated I probably would close up by noon, but since I have meditated on it——

The Court: You mean call all the witnesses?

Mr. Montgomery: All the Time witnesses or most of them so when I get through I don't imagine there will be much if anything for Mr. Frates to do as far as the actual argument.

Mr. Frates: When you are through, that is not going to be much, I hope we can go home.

The Court: Mr. Montgomery, it is my impression of the law at this time this gentleman has been called as an adverse witness. I don't believe that others can be called as adverse witnesses.

Mr. Montgomery: I don't imagine I am going —I am going to ask the Court after several questions of Mr. Delaney, probably, who was actually in charge down here, pertaining to this article and perhaps it may be necessary to make him a hostile witness if I call him. I haven't made that decision, if the Court please.

The Court: I am just merely expressing my [288] opinion right now.

Mr. Frates: I know that, but in answer to this one he was not in charge down here. He is a stringer and I certainly would object.

The Court: They testified to his status. I think there is no question about his status. Everybody says he is a stringer and explained what that is. Offhand I would think he would not qualify, particularly since you are entitled to have one managing agent or only one as an adverse witness.

Mr. Montgomery: Thank you, Your Honor.

The Court: We will resume after lunch. Will you call the jury, please.

(Thereupon, the jury returned to the Courtroom and the following proceedings were had in their presence and hearing, to-wit:)

The Court: Ladies and gentlemen, I am sorry we took so much time. I think we are going to recess for lunch now so you don't need to sit down

if you don't wish to. I have a meeting I have to attend and so I will have to recess until a quarter of two today. [289] Sorry to take so long, but please remember, and you do, I am sure, remember all the instructions I gave you before when you separated. It is very important that you follow these rules. You are not to read anything or hear anything about this case and we will recess until a quarter of two, Mr. Bailiff.

(Thereupon, at 12:05 o'clock p.m. the trial was recessed until 1:45 o'clock p.m.)

[290] CERTIFICATE

* * *

[292] AFTERNOON SESSION (1:45 p. m.)

Mr. Frates: Your Honor, the status of the question propounded to Mr. Daniels, if I'm correct, Your Honor sustained the question and counsel asked to be heard.

Mr. Montgomery: He overruled it. What was it, General, overruled? Mr. Finley is gone is the reason I ask you.

The Court: I thought some of the questions you asked were argumentative. I did say that the general subject was, should have been whether he did or not.

Mr. Frates: Your Honor, the question we objected to, if my memory is correct, is that he was, isn't it true that you knew for alimony you couldn't get a divorce. He said he didn't know the answer to the question.

The Court: You objected but he had already answered.

Mr. Frates: He had said that several times.

Mr. Montgomery: Let's go back. If I understood, and maybe I'm wrong, but I understood that Your Honor would at this time simply tell the jury that an adulterous wife in Florida could not get alimony, did I understand that [293] correctly?

The Court: Not if he objects to it.

Mr. Frates: Of course I object to it and I understood your ruling to be the opposite.

The Court: You misunderstood me. I am not saying it won't be given, I said I thought it was a proper subject to bring up in the charge if it's proper. And the other question I think he answered, he objected but he answered that he didn't know and it would seem to me that this witness would terminate that particular phase of it.

Mr. Montgomery: All right.

The Court: All right. Call the jury please.

(Thereupon, the jury returned to the Courtroom after the noon recess and the following proceedings were had in their presence, to-wit:)

The Court: I have your note and perhaps we'll have a better idea later this afternoon.

Direct Examination by Mr. Montgomery (Continued):

Q. Mr. Daniels, is Mr. Duncan still with Time?

A. Yes.

[294] Q. Where is he located presently?

A. He's in Canada.

Q. And at the time this article was printed what was his position with Time, Incorporated?

A. He was in the Miami Bureau.

Q. Is he here for this particular trial today?

A. No, sir, I don't think so.

Q. Now, you mentioned that in these particular matters that you had before you that the quote, if I've got you down correctly, that the infants close quote of an adultery was in there, did I quote you correctly?

A. I guess so, yes, sir.

Q. All right, sir. Now, I want to ask you to look at the dispatches, one at 11:54 a.m. from your office in Miami, this is the 1:25 one.

A. I think you took it.

Q. Well, if I did I don't have it.

Mr. D'Aiuto: Here.

By Mr. Montgomery:

Q. Plaintiff's Exhibit Number 4 and Defendant's Exhibit Number 2 are the two dispatches, that is, the information that you received from your Miami Bureau office; is that correct, sir?

A. Yes, sir, this is part of it.

Q. Did you receive any other quoted matter of the judge, [295] Judge Knott, other than is contained in those two pieces of evidence in this particular case?

A. Do you mean——

Q. From your office, from any agent——

A. By the time we published it?

Q. Yes.

A. No, this is it.

Q. From any agent, servant, employee or officer of Time, Incorporated?

A. No, sir, not so far as I know.

Q. And what was the purpose of using, or the purpose of asking these questions directed to your employees down here in Miami is to find out so far as Time was concerned accurate quotations from the Judge?

A. Yes, sir.

Q. Okay. And the rulings of the Judge?

A. Yes.

Q. And in those dispatches was there words that said that there was a ruling of the Judge and was that ruling "quoted verbatim"?

A. Wait one second.

Mr. Frates: Counselor——

The Court: He wants to confer a minute.

(Whereupon, proceedings were had out of of the hearing of the [296] Court Reporter and jury.)

By Mr. Montgomery:

Q. There were no other dispatches, as I understand, received from anyone connected with Time that is your employees other than those two dispatches?

A. There were two other dispatches but this was the bulk of the material we received from our own people.

Q. You mentioned two other dispatches, what were those?

A. This here, telephone conversation with Dick Duncan.

Q. Wait a minute. That's Defendant's "C" for identification.

A. And then there's this other dispatchment on Dick Duncan.

Q. Those two little short dispatches had nothing pertaining to the words of the Judge so far as his ruling was concerned, is that correct, Mr. Daniels?

A. No, you're right, that's right, yes, sir.

Q. Now, this was on a Saturday, were you at the office?

A. Absolutely.

Q. And as senior editor did you just have Milestones?

A. No, I believe I had, let's see, we had people at that time, I was also in charge of the captions.

Q. Captions for the whole magazine?

A. Yes, some other bits and pieces.

Q. And I believe that Mrs. Nadasdy has already testified, [297] did you know that the file for a time had been lost?

A. No, I didn't.

Q. Did you know that the file had to be picked up from the legal department of your corporation?

A. The file, I am——

Q. Yes, the Milestone file and all those other papers?

A. No, sir, I did not.

Q. Did you know that there was a case pending by Mrs. Firestone?

A. No, sir.

Q. At this particular time against Time, Incorporated?

A. I did not.

Q. Well, then, Mr. Daniels, let me ask you this. Did you read the file?

A. Which file?

Q. The file on the Firestones, sir.

A. No, I said I didn't know about it. This is what I read.

Q. If Mrs. Nadasdy says that contained in the Times, Incorporated, Firestone file was a report that there was a suit then pending against Time, Incorporated, you never saw that?

A. No, sir.

Q. Let me ask you this, sir. Did you go, did you likewise check the accuracy?

[298] A. This is the material that we had to go for it, it seemed perfectly clear.

Q. My question was did you as the editor make final approval of this particular article for publication to over

three and a half million people, did you make any effort to correct it for accuracy or determine the accuracy of it?

A. Well, Miss Nadasdy is the researcher and I trust her.

Q. I asked if you did, sir?

A. Did I personally?

Q. Yes, sir.

A. Beyond reading the file and correctness, no, I did not.

Q. What do you mean by reading the files, sir?

A. Just what I said, reading the files.

Q. What files?

A. These files.

Q. Was there anything else contained in the files?

A. Well, this is a matter of Time, Incorporated, our own talk. We call a cable a file. This single thing here is called a file, this happens to be our shop talk. That's what I mean by file.

Q. So those two things, the dispatches are the only thing that you had?

A. I also saw the appeal and I also saw the Daily News. [299] This is our report, this is our file. This and these two other pieces of paper, these are our files, this is what we, common company parlance call our files.

Q. What was Mrs. Nadasdy saying earlier in her testimony pertaining to examining files, what kind of files was she talking about?

A. I don't know.

Q. Do you have any other files with Time, Incorporated, that would be in addition to that?

A. I—there might be a folder on Mrs. Firestone but that would be news clippings from the past, or Mr. Firestone.

Q. Did you see any such thing when this was put on your desk for final approval for publication?

A. No file was put on my desk, it's not our practice.

Q. What did you rely on?

A. I relied on these papers.

Q. Show me the papers you relied on.

A. These two papers, the four papers, the reports from the Courts.

Q. Show them to us, please.

Mr. Frates: Your Honor, may I approach the bench?

The Court: Very simple, hold them up, show them to the jury.

[300] Mr. Montgomery: I want to identify them.

The Court: What exhibits they are and that's the end of it.

Mr. Frates: Yes, sir.

By Mr. Montgomery:

Q. You relied on Defendant's Exhibit for identification "D"; is that correct?

A. Yes, sir.

Q. Defendant's for identification "C"?

A. Yes, sir.

Q. Defendant's for identification 2, you see the two I have here?

A. Yes.

Q. And Plaintiff's Exhibit 4 in evidence?

A. And this as well.

Q. And this as well?

A. This was in the beginning.

Q. Did you rely on a newspaper clipping?

A. No, this was what we read to——

Q. No, sir, please, I am talking about reliance for publication.

A. No.
Q. Did you rely on any newspaper clipping?
A. No.
Q. Are these the things that you relied on?

[301] Mr. Frates: May I ask Your Honor to instruct Mr. Montgomery to please let the witness answer the question.

The Court: Let him finish, I think he's trying to tell you what he relied on, Mr. Montgomery, let him take his time.

The Witness: Time relies on its own correspondence and this is what we relied on, our files and our correspondence.

By Mr. Montgomery:

Q. Consequently you relied on Plaintiff's Exhibit No. 4, Defendant's Exhibit No. 2, Defendant's Exhibit for identification "C" and Defendant's for identification "D"?
A. Yes.

Mr. Montgomery: We would like to mark Defendant's Exhibit for identification "D" into evidence, please.

The Court: Offer it in evidence, any objection?

Mr. Frates: No.

Mr. Montgomery: And Plaintiff's "C".

Mr. Frates: No objection. I have no objection. We had them marked for identification.

The Court: Thank you, they will be admitted.

The Clerk: As Defendant's Exhibits?

[302] The Court: No, they will be admitted as Plaintiff's. They are actually being offered by Plaintiff.

The Clerk: Defendant's "C" for identification now in evidence as Plaintiff's 7 without objection.

Defendant's "D" for identification now into evidence as Plaintiff's 8 without objection.

(Thereupon, the document previously marked Defendant's Exhibit "C" for identification was received in evidence as Plaintiff's Exhibit No. 7 and made a part of the record.)

(Thereupon, the document previously marked Defendant's Exhibit "D" for identification was received in evidence as Plaintiff's Exhibit No. 8 and made a part of the record.)

By Mr. Montgomery:

Q. Now, may I see the Time magazine, please?
A. It's right here.
[303] Q. Thank you. Were you in charge of this caption found at page 49?
A. Yes, sir.
Q. What does it say?
A. Cassidy cutting tape, the only drawback is the price.
Q. What does that say, sir?
A. Libel.
Q. What? Libel?
A. Libel. This is the head on the story.
Q. So in this same magazine in which you published this article you had an article pertaining to libel in that same magazine, did you not, sir?
A. Yes.
Q. Does your legal department assist you in your page or part of your particular magazine under "The Law"?
A. Yes, sir, I believe so.
Q. In order to make the caption for this matter did you have to read that article?
A. Yes, sir.

Q. In order to be the senior editor of this magazine in 1967 did you have to know about the law and libel?

A. Only in very general terms.

Q. Just in very general terms. All right, sir. Now, we were talking about deadlines. When was the deadline for this particular article?

[304] A. Deadlines are very flexible, a deadline ordinarily is, for the magazine, midnight on Saturday, for the Milestone section we technically can go up to the absolute deadline and in practice we try to close it up by 9:00 o'clock on Saturday night, in general.

Q. So these articles, the last one that was called in to you by telephone was 1:25; is that correct?

A. P. M.

Q. And there was nothing else done. You had how many hours to, let's see, that would be about seven hours left, is that correct, before——

A. Before it finally gets out to the printer in Chicago. I don't know what happened that particular week, whether we were early or late or what, sir.

Q. All right, sir. Now, I ask you, please, sir, did you ever see a demand for retraction from Mrs. Firestone's then lawyer, Mr. Joseph Farish?

A. I did not, sir.

Q. Was it ever brought to your attention prior to this case being filed?

A. No, sir.

Q. Was anyone in your department notified of the demand for retraction in this case?

A. I don't know, sir.

Q. So then therefore no one paid any attention so far as [305] you are concerned as to the accuracy of the article that you allowed to be published in that magazine?

Mr. Frates: Your Honor, that's an argumentative statement.

The Court: Objection sustained. I think that's strictly something you are going to argue.

Mr. Montgomery: All right.

By Mr. Montgomery:

Q. Let's go when the suit was filed. Were you advised that Mrs. Firestone, in April of 1968, some four months after this article, had filed suit in this case?

A. I was advised when I signed the deposition, I don't really recall exactly when it was.

Q. You mean your affidavit?

A. Yes.

Q. Who prepared that affidavit, by the way?

A. Our legal department.

Q. Your legal department. Did you execute it in your legal department?

A. Did I execute it—I don't recall exactly where I did execute it.

Q. Did you know that the same firm that represents you in this particular case represented Mr. Russell Firestone in the divorce case?

[306] A. I did not, sir.

Q. After suit was filed were you ever contacted pertaining to the accuracy and truthfulness of this particular article?

A. No, sir.

Q. You therefore made, were not requested to make any further investigation pertaining to this article?

A. I did not.

Q. Well, let me ask you this. Is it the policy of Time magazine of, not to make retractions because it would reflect on the accuracy of reporting to the readers?

A. That is not so, sir.

Q. Sir?

A. That is not so.

Q. That is not so?

A. No, sir.

Q. Then there was no reason why you would not make a retraction so far as you are concerned in this particular matter?

A. In our——

Mr. Frates: Excuse me. Go ahead, I withdraw it.

Mr. Montgomery: I will withdraw the question.

Mr. Frates: I think the question is proper.

The Court: He withdraws it now. Is that right, Mr. Montgomery?

[307] Mr. Montgomery: Yes.

By Mr. Montgomery:

Q. Well then, let me ask you this. You were called upon to give an affidavit in this particular case which we have referred to, I think as being in September, October of 1968; is that correct, sir?

A. I don't have the date at my fingertips. If you say so.

Q. Sometime around there. I have it here if it's that important, Mr. Daniels. Let me just check. I think you swore to this affidavit on September the 10th of 1968.

A. Yes, sir.

Q. That affidavit was made in connection with this present pending lawsuit, was it not?

A. Yes, sir, I imagine so.

Q. By the way, have you ever been to Miami to the Bureau around this time, December of '67, '68?

The Court: Did you say had he ever been?

Mr. Montgomery: Yes, sir.

The Witness: I don't think so. I did come through on my way from South America in one of those years. I don't recall which year it was, I don't think so, I think it was probably 1965, '64.

By Mr. Montgomery:

[308] Q. Let me ask you this. Do you know of your own knowledge that Time, the magazine newsweekly Time, and the magazine Life, shared the same offices down there in Miami?

A. I didn't know that, I assumed that it could well be, I don't know. I haven't actually been to the physical bureau, I have come through and had dinner with correspondents on various occasions.

Q. Back to this affidavit on September the 10th, 1968, at that time when you went down to your legal department to ask them about, or to execute this affidavit, or to give the affidavit at that time, did you ask them anything about the legal ramifications of this particular publication which you yourself approved?

A. No, sir, the affidavit said it was accurate, I believed it was.

Q. Now, I believe in 1968 the president of your corporation was a James Linen, with one "N"?

A. Yes, that's right.

Q. He's not president now?

A. No, sir.

Q. Is he still associated with Time, Inc., in any way?

A. Yes, sir.

Q. What is he now?

[309] A. He is chairman I believe of the executive committee.

Q. All right, sir. Now, are you aware that President Linen of Time, Incorporated, executed some affidavits in this particular case?

A. No, sir.

Q. Or Interrogatories, actually, some questions and answers?

A. I—no, sir.

Q. Then am I correct in assuming that when the Interrogatories or these matters were signed by President Linen that you or no one from your department was consulted pertaining to the accuracy, the truthfulness of this article?

A. I don't know about my department, sir, I was not.

Q. You were not?

A. No, sir.

Q. There was a question to President Linen in that particular answer to Interrogatories as to what sources of information he used or Time, Incorporated, used in order to publish that particular article.

Were you ever asked or to your knowledge as to what articles or what matters you in fact did use?

A. We had the file.

Q. For that investigation?

A. We had the files.

[310] Q. My question is were you ever asked by Mr. Linen or anyone on behalf of Mr. Linen exactly what was used?

A. No, sir, it was perfectly clear anyway.

Q. No, looking at your affidavit again, Page 2 of it, pertaining to the reason that this went into Milestones—excuse me, sir. Let me refer specifically so we won't have any difficulty. Did you say that on your affidavit?

A. Yes, sir, I signed it.

Q. What does it say? Would you read that portion to the jury?

A. "Furthermore, the length of the divorce proceedings and the type of testimony as adduced at the trial made the divorce of Mary Firestone of equal interest to our readers."

Q. I see. You mentioned that the testimony taken at the trial——

A. Adduced at trial.

Q. Did you know the Court sealed that file for the protection of Mark Firestone?

A. No, sir.

Q. Well, then, where did you get that information pertaining to the testimony, who told you about that?

A. From the——

> Mr. Frates: Your Honor, the public records [311] show that that was a public hearing with certain interludes. I don't think counsel ought to make this statement that it's not accurate.
>
> Mr. Montgomery: Your Honor, pardon me, may I be heard? That is not true, sir. His own firm represented Russell Firestone and the Court file is sealed, it was by stipulation of counsel, his firm and Mr. Joseph D. Farish and I have the transcript in my office.
>
> The Court: That may be so, I don't know when it was sealed. I know there was an awful lot about the testimony out in public. Also a lot of it was contained in the order of Judge Knott which was public.

By Mr. Montgomery:

Q. Returning to testimony, where did you get that information pertaining to the testimony when you made that affidavit, that that was one of the main reasons that made it of interest to your readers?

A. I thought it was a matter of common knowledge, it was all over our own files, over the Associated Press, Daily Press, it was a quote from the Judge's opinion.

[312] Q. Now, you mentioned in this particular matter, excuse me, withdraw that question.

So far as the directions to the Miami Bureau, I am referring to the last paragraph of your affidavit, Page 2, did you give those directions to Mrs. Nadasdy?

A. No, I didn't give absolute those directions, it's her job as checker to ask these questions, I didn't say did you do this, she went ahead and did it on her own.

Q. She knew her job, her job was to, number one——

Mr. Frates: Don't mark that, please, Mr. Montgomery.

Mr. Montgomery: I have already got it marked, this is my affidavit.

Mr. Frates: I am sorry.

The Court: It's your copy?

Mr. Montgomery: Yes.

By Mr. Montgomery:

Q. Thus the Miami Bureau was asked to check, number one, the grounds on which the divorce was granted as stated by the Judge?

A. Yes, sir, that's what it says.

Q. Number two, the date of the marriage?

A. Uh huh.

Q. Three, the birthdate of both parties and their son?

A. Uh huh.

[313] Q. The amount of alimony, right, sir?

A. That's what it says, yes, sir.

Q. Well, this is your affidavit.

A. Yes, well, you are asking if it's right, it is right.

Q. Five, the resolution of the custody of the child and lastly, and the correct spelling of the child's name, is that what you asked them to get you?

A. Yes, sir.

Q. And that was done under your direction as normally done in things of this nature to which you tell your people that work for you to get done; is that correct?

A. Yes, sir.

Q. And you depend upon them to do it?

A. Yes, sir.

Q. Why was the child's name important?

A. Well, I think Miss Nadasdy thought we probably might want to use it.

Q. Now, also in these matters going down to your Bureau, the last one where Mrs. Nadasdy followed your instruction, the last three words there is "need useable quotes." What does that mean?

A. Just what is says.

Q. That's to sell magazines, isn't it?

A. No, sir, it's to report the news.

Q. To report the news. Have you ever seen the Court [314] order in this particular case?

A. I'm not sure I know what you mean by the Court order.

The Court: You say this particular case. I don't know whether you mean the one we are trying right now.

Mr. Montgomery: This one we are trying right now, sir, none other.

By Mr. Montgomery:

Q. The order of the Judge, have you seen that?

Mr. Frates: Excuse me, I think, Your Honor, I interpreted, you are talking about the final judgement in the divorce case?

Mr. Montgomery: Yes.

Mr. Frates: Well, I don't think that's what we thought.

The Court: I am sorry, I misunderstood you. I asked you about this particular case, you said yes.

Mr. Montgomery: There is no final judgement in here yet.

The Court: But you said order, you didn't say judgement.

Mr. Montgomery: I beg your pardon, there are a number of orders. I am talking about, excuse me, I misunderstood you. My question [315] to the witness is has he ever seen the order of Judge Knott in the divorce case.

The Court: That's right, more properly termed final judgement. All right. So we all know what you are referring to.

The Witness: Yes, sir.

By Mr. Montgomery:

Q. When is the first time you saw that?
A. Oh, I guess about a month ago.
Q. About a month ago?
A. Yes, sir.
Q. First time you had ever seen it?
A. Yes, sir.
Q. Now, in this particular article here, when it said need useable quotes it mentions about testimony and the article in Milestones ends up to the degree to make Doctor Freud's hair curl. Is that what you mean by needed useable quotes?
A. That's the quotes we used.
Q. For what reason did you use that quote?
A. Because this is what the Judge said.
Q. And that was what was taken out of this?
A. No, sir, I told you, I just saw that. What I took that out of and what Mr. Doerner who wrote the article took it out of was our file.

[316] Q. Were you familiar that the Court—you were not then familiar at this time of anything in this particular order?

A. I was familiar with the files, that's what I was familiar with, sir.

Q. Who makes the decision to use these quote useable quotes from judgements and orders such as this, is that your decision?

A. The writer writes it and I approve it. It's essentially my decision to use it.

Q. So you are the man who made that decision to put that in this magazine; is that right?

A. Yes, sir. Yes, sir.

Q. Now, during this particular time, in noticing in your affidavit, when preparing your own affidavit you reviewed Mrs. Nadasdy's affidavit as well as the other affidavits attached?

A. No, sir, I did not.

Q. You did not review Mrs. Nadasdy's affidavit?

A. No, sir.

Mr. Montgomery: Well—excuse me, Your Honor, just a moment. What did I do with those affidavits?

The Clerk: I don't have them over here.

Mr. Montgomery: Excuse me, Your Honor, just a moment.

[317] The Court: His he probably has.

Mr. Frates: I have a copy here.

Mr. Montgomery: I have it here, thank you, Mr. Frates, for your help.

By Mr. Montgomery:

Q. At Page 2 you state, "Nevertheless, as indicated in the Exhibit to the affidavit of Ursula Nadasdy further efforts were made to check the accuracy of the reported

statements and facts pertinent to the divorce itself." That's what you say in your affidavit.

Mr. Frates: That's not in conflict here, he's talking about two exhibits and he's asking did you read the affidavit and he said no and he's talking about the two exhibits that have been identified.

The Court: He can explain it. As it seems to me so far I think it needs some explanation. I'll overrule the objection.

Mr. Montgomery: We were told to make objections on legal grounds, now Mr. Frates just stated words that meant excuse me, I don't want to go into it but——

The Court: I don't think he was making much of an argument or a narrative, it's a simple thing.

[318] *By Mr. Montgomery*:

Q. What do you mean by that, Mr. Daniels?

A. Just one second, please. Well, what I meant by this was we asked the Miami Bureau to check it out, check it out further.

The Court: I think he's looking at the wrong place.

The Witness: No, I'm looking here.

By Mr. Montgomery:

Q. "Nevertheless, as indicated in the exhibit to the affidavit of Ursula Nadasdy," you refer to her about her affidavit in your affidavit, sworn testimony?

A. No, sir, I am sorry, I did not.

Q. But you put down in that affidavit knowledge that you had, or stated that you had knowledge of her affidavit because you reviewed some matters attached to it, did you not, sir?

A. No, I didn't say I reviewed, I said further efforts were made to check the accuracy of reported statements.

Q. Excuse me, sir. Let me get a pen so we will know exactly what you are talking about. You say here, "Nevertheless, as indicated in the exhibit to the affidavit of Ursula Nadasdy," certain things.

A. I think I believed at that time that this referred to the checking wire but I'm not sure.

[319] Q. All right, sir. Well, let's just go—Mrs. Nadasdy in her affidavit as well as in her testimony stated that it was a Time requirement to check every word for accuracy and this was done by a mark over the word, is that true or not true?

A. That is true.

Mr. Montgomery: Your Honor, may I have just a minute? These exhibits are all over.

The Court: Sure.

The Witness: Could you be looking for this?

Mr. Montgomery: Yes, sir. Thank you.

Mr. Frates: I have a couple here, originals.

By Mr. Montgomery:

Q. I am referring to Plaintiff's Exhibit No. 5. Are you familiar with what that is, sir?

A. Yes, this is the checking copy.

Q. And in that particular checking copy are all the words used in it checked that are typewritten?

A. No, sir.

Q. What words that are typewritten are not checked to fulfill Time's requirement?

A. Trial is not typewritten.

Q. No, not typewritten, those words that are typewritten——

A. Beg your pardon, you said typewritten.

Q. Yes, sir, give the jury the names, or the words that [320] are typewritten.

A. That are not checked?

Q. That are not checked.

A. Yes, "the," "month," "trial," and "adultery," those four words.

Q. "The," "month," "trial," and "adultery"?

A. Yes, sir. And "one time" is not dotted either, nor is "42" dotted, there are a lot of words in here that are not dotted.

Q. I am talking about typewritten words.

A. I am talking about typewritten words.

Q. The thing speaks for itself. Since the world "adultery" is not checked as Time requires it, what did that mean to you when you saw that copy?

A. I very often do not see this checking copy I see what's called a yellow—what happens here, this is initialed by the researcher, goes to the copy desk, they transfer the changes to what we call the hard copy and that's what I see finally.

Q. Well, you mean before—you let this article out without seeing where the researcher had actually checked each word for accuracy, sir?

A. The assumption is when she initials it here it's checked for accuracy, whether there is a dot missing over the word, the assumption is she has checked [321] every word, whether a pencil slipped or not, didn't put a dot over "trial" or "month" or "they" or "42," the word "adultery," the assumption is when she signs it and turns it in it's checked and if she has a problem with it she takes it up with the writer or up with me.

Q. Mrs. Nadasdy said that all of this, including this item right there, went to you as well as Mr. Doerner, is that true or false?

A. I don't recall seeing the checking copy, I may have but I don't recall it.

Mr. Frates: I object to that, she didn't say that. She specifically said the other copy.

The Court: What we are going to have to do now, I am going to sustain your objection for this reason, not because, primarily because he says it is or isn't correct. That's his rememberance, yours may be something else. But it's difficult when you say she said something and ask him if that's correct.

You can ask him what he did and what he saw and in your argument you can point these things out and it makes it much more [322] likely until we get the actual facts so I will sustain it. I am not passing on whether it was a correct statement or not a correct statement of it. The jury understands that. I am saying you should approach it another way at this time.

Mr. Montgomery: All right, sir.

By Mr. Montgomery:

Q. May I ask you this question, please, sir. The absence of the mark over the word "adultery" did not even, you did not see it, is that correct, did you see one like it?

A. It doesn't mean anything, sir.

Q. Who would have seen it in order to make sure that this word was checked for accuracy, anyone other than Mrs. Nadasdy?

A. Mrs. Nadasdy is responsible for the checking, when she signs it, she indicates by her initials that it is checked and it is accurate.

Q. But Time requirement is, as you have already admitted and told us, is that each word is supposed to be marked; is that correct?

A. This is the requirement, it's a slip of the pencil.

Q. And she didn't meet that requirement, did she?

A. In that sense, no, she did not.

[323] Q. Now, when these matters are brought up from your Miami Bureau they come up there to a reporting room, do they not?

A. Sometimes, sometimes they come over the—this is the telephone, they do come to the recording room, yes.

Q. What about when they go out, are they also recorded going out?

A. No, they are sent over teletype going out.

Q. This is records number thirteen and record number three?

A. No, I think they mean by their record number thirteen as well.

The Court: Speak up a little, please, sir.

The Witness: I think this was typed wrong, I think it's record number thirteen, as well, it has the number mark, I don't believe that's actually what it is, I think it's also record number thirteen, I think that's just a mistake.

By Mr. Montgomery:

Q. A mistake?

A. Yes.

Q. In any event, there was a recording made of that, was there not, sir, made in Time?

[324] A. Yes, sir.

Q. How long are those recordings kept?

A. I don't know.

Q. You don't know?

A. No, I don't know, that's a function of the morgue, I don't know.

Q. Have you ever listened to those records?

A. No, sir.

Q. Have you ever seen the records?

A. No.

Q. Now, one final question, you were asked, or Mrs. Nadasdy or Applegate or someone was asked for your Miami Bureau to send them quote useable quotes. May I ask you, sir, why wasn't the ruling of the Judge quoted in the quotation marks that were given to you in those dispatches?

A. Just one second. Well, Judge James Knott commented, "According to certain testimony in behalf of the defendant, Russell, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Doctor Freud's hair curl."

"Other testimony in the plaintiff's behalf would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr."

[325] The Judge ruled, "It is —" et cetera. It seemed to me all this was from the Judge's opinion.

Q. What does the word rule mean to you, the Judge ruled, what did that mean to you?

A. That's his opinion.

Q. And what do those quotes say when the Judge said he ruled that was his opinion?

A. I don't understand the question.

Q. Let me just point it out to you. The Judge ruled, quote——

A. "It is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication and that the marriage should be dissolved."

Q. Is there any misunderstanding on your part, with all your experience as senior editor of Time, that that was the Judge's ruling, that was his opinion so far as the grounds for divorce was concerned?

Mr. Frates: Your Honor, that is not an accurate statement, that's an argument.

The Court: All right. You want to be specific?

Mr. Frates: The grounds——

The Court: Please, first state if you are going to object.

Mr. Frates: I object, Your Honor. It's a [326] matter of argument.

The Court: Sustain the objection to the form of the question, not to the subject.

Mr. Montgomery: No further questions. Your witness.

Cross Examination by Mr. Frates:

Q. Mr. Daniels, on the specific request as to what the grounds were do your records reflect that Mrs. Nadasdy or Time went back and tried to determine the grounds for the divorce?

A. Yes, sir.

Q. And would you refer to that information?

A. Yes, sir.

Q. And tell us what information you received on the grounds of the divorce.

Mr. Montgomery: Excuse me. May I ask from whom, also, be included in that question.

Mr. Frates: That's all right, sure.

Mr. Montgomery: And from whom.

The Witness: We received on the specific issue of the grounds of divorce from Bob Delaney, "The technical grounds for divorce according to Joseph Farish, Jr., attorney for [327] Mary Alice Firestone, were given as extreme cruelty and adultery." And then it goes on.

Mr. Frates: Your Honor——

The Court: Let's proceed.

Mr. Frates: All right, sir. All right.

By Mr. Frates:

Q. And in the Milestones, excuse me, folks, in the Milestones you have grounds of extreme cruelty and adultery? A. Yes, sir.

Q. Is that what it says? May I see the final judgment?

A. The final judgment?

Q. Is that here or over—it's right here. Plaintiff's Exhibit 2, does that say that the husband's answer and counterclaim for divorce on the grounds of extreme cruelty and adultery?

A. Yes, sir.

Q. Is that the same phrase used in there?

A. Yes, sir.

Q. Mr. Daniels, talking about the counterclaim, referring back to what the Judge ordered and adjudged, in the final judgment, "Ordered and adjudged, that the equities in this cause are with the defendant; that the defendant's counterclaim for divorce be and the same is hereby granted," does it say that?

[328] A. Yes, sir, it does.

Mr. Montgomery: Excuse me, Your Honor. I object to that because they never did see that order until a month ago.

The Court: I think that's correct. He testified, he's just looking at it now. He didn't see it before.

Mr. Frates: That's right, Your Honor, but again it goes right back to the words that were used.

The Court: I know it, and again, Mr. Frates, if you have an objection to Mr. Montgomery's argument, I think this is argument. You are not proving

anything by this witness by his reading it. The jury will have it. He did not see it till a month ago.

Mr. Frates: We concede that, of course.

By Mr. Frates:

Q. All right. Now, referring to Plaintiff's Exhibit 1, the magazine itself, Mr. Daniels, from the information that you had when that was compiled did you believe it was accurate?

A. Yes, sir.

Q. And did you believe that the research that you had done warranted that story?

[329] A. Yes, sir.

Q. And did you believe it was true?

A. I did.

Q. When it was published and approved?

A. I did.

Q. And do you still believe that it is true and accurate?

A. Yes, sir, I do.

Mr. Frates: May I have these two marked for identification, these two documents?

The Clerk: Defendant's——

Mr. Frates: Counsel, these are the other two copies of——

The Clerk: Defendant "F" and "G" for identification.

(Thereupon, the documents referred to were marked Defendant's Exhibits F and G for identification only.)

The Court: Show them to counsel.

Mr. Frates: Yes, sir, he has a copy.

Mr. Montgomery: I will have to compare it, is it the same as the other one?

The Court: Let him look at it before we go ahead.

Mr. Montgomery: Excuse me, I have never seen [330] this before.

The Court: Which one have you not seen?

Mr. Montgomery: Defendant "F".

Mr. Frates: They are attached to the affidavits, Mr. Montgomery, on the original Court file.

Mr. Montgomery: I am sorry, Mr. Frates, I never saw it before.

Mr. Frates: They are there in the Court file.

Mr. D'Aiuto: May I see the Court file, Your Honor? Thank you. Whose affidavit is that attached to?

Mr. Medina: A checking copy was attached, I don't think the printer's copy was attached.

Mr. Frates: They are the same thing.

Mr. D'Aiuto: Whose affidavit, you said it was attached to the affidavit.

Mr. Montgomery: Yes, I have not seen it. I don't have any objection to him using it but before they go into evidence——

The Court: All right. Go ahead and use them for this purpose.

Mr. Frates: All right. How about this one, make sure. Have you seen that?

Mr. Montgomery : No, the only one I have seen was the one that was marked. That was the [331] only one furnished me.

By Mr. Frates:

Q. Mr. Daniels, referring to—I am having more trouble, Mr. Clerk. You will have to bear with me.

The Clerk: G.

The Court: Those for identification are marked with letters and we mark them with numbers if they are put in.

Mr. Montgomery: If Your Honor please, those are not attached to the Court file's affidavit, Mr. Frates.

Mr. Frates: Well, these documents are part of the records. Now, do you have any objection to them?

Mr. Montgomery: I don't know what you are going to use them for. The point is they are not attached to the affidavit.

The Court: That wouldn't necessarily make any difference so you go ahead.

Mr. Frates: All right.

By Mr. Frates:

Q. "G", is that, excuse me, sir, is that the same statement as on Plaintiff's Exhibit 5 with the marks over it?

A. Yes, sir.

[332] Q. Would you compare that?

A. They jive.

Q. Are they exactly the same as far as the word is concerned?

A. Yes, sir.

Q. And you mentioned a copy that came to you, can you tell whether this "G" is the copy that came to you?

A. This is the hard copy, this is the copy I finally read and then I circled my initials, that means I have seen it for the last time.

Q. All right. And the one with the marks with Mrs. Nadasdy's copy?

A. Yes, sir.

Q. Is that right?

A. They are the same.

Q. All right. Now, can you identify "F" for us?

A. That's my edit of the writer's version.

Q. All right, sir.

The Court: Say that once again, sir.

The Witness: That is my edit of the writer's version, the writer writes a version and I——

The Court: Edit it?

The Witness: And that's what I did with it.

By Mr. Frates:

Q. Did that edited version result in the yellow copy?

[333] A. Yes, sir, after it was seen by the assisting managing editor, MJG.

Mr. Frates: Counsel, these are listed, number 13 on the pre-trial in the file.

Mr. Montgomery: I don't——

Mr. Frates: That's all right, I was incorrect on the affidavit, they are listed on the pre-trial statement in the file.

Mr. Montgomery: Are you through, sir?

The Court: Do you have other questions?

Mr. Frates: Had you finished—I thought he was going——

Mr. Montgomery: No, I said I was going to look while you go on and get things done.

By Mr. Frates:

Q. Mr. Daniels, one further question. The AP report I am looking for, is that there?

A. I believe it's here, sir.

Q. Can you tell the jury what setup you have physically to get that AP report?

A. We have an AP wire, we have a copy boy who works solely with the AP.

Q. Of course that's Associated Press?

A. Yes, Associated Press, it comes over the wire and the tickers. He clips it off and takes it to the [334] appropriate department. In this case he took it to me.

Q. All right. The jury has seen this, Defense Exhibit Number 1. And did that come to you?

A. Yes, sir.

Q. Cross your desk?

A. Yes, sir, that's what the "D" means.

Q. And as a result of that what did you do?

A. I write it, I put down, "Lanny, let's go," for——

Q. Would you show the jury for where you, just hold it up and point it out. It's in writing there?

A. "Lanny, let's go."

Q. All right. Now, what—translate, what does that mean?

A. That means it's for Milestones, let's do it.

Q. Who is Lanny?

A. Lanny is Landon Jones, I was a little bit confused, Lenin Jones was our regular Milestones writer, Bill Doerner had been writer for six months previous. Lanny, I've forgotten, either had an Army Reserve commitment and Bill, who was then doing what we call Swinging in the back of the book, he had graduated from Milestones, gone on from Milestones to doing other sections and he came back this week to give us a hand, help out.

[335] Q. That's Bill Doerner?

A. Bill Doerner.

Q. Who was the writer, the member of the team that was the writer on this particular——

A. Bill, Bill is the writer.

Q. Bill Doerner?

A. Yes.

Q. Would you tell these folks why you thought it was worthy of Milestones?

A. Because Mr. Firestone is a man of considerable fame and captain of the U. S. industry and a man in who Time's readers are interested.

Mr. Frates: Thank you. No further questions.

The Court: Let's don't get all these mixed up now.

Mr. Montgomery: No, sir, I have got them.

Redirect Examination by Mr. Montgomery:

Q. Where is Mrs. Nadasdy's initial on that yellow copy?

A. Right here, sir, "UN".

Q. All right, sir. What is this, "KH"?

A. I don't know who "KH" is. I think it's a copy reader, a copy reader is a person who reads it to make sure our grammar is correct and we don't spell fortune wrong or something like that, the very end.

[336] Q. Referring to, first, is this your writing up here, the handwriting?

A. Yes, the "GD" in the corner there is my initials.

Q. So you are the one who ultimately got it in final form for publication?

A. Yes, sir.

Q. Now, in this, that you had before you, I don't have any objection to this, would like it to go into evidence, Defendant's Exhibit G.

The Court: All right. You want to offer it

Mr. Montgomery: Yes, sir.

Mr. Frates: Sure.

The Court: It will be admitted.

Mr. Frates: You want to put both of them in?

Mr. Montgomery: That one in right now, Mr. Frates, the other in a minute.

The Court: Plaintiff's Exhibit.

The Clerk: Defendant Number F for identification into evidence as Plaintiff's Number 9 without objection.

(Thereupon, the document previously marked Defendant's Exhibit F for identification was received in evidence as Plaintiff's Exhibit Number 9 [337] and made a part of the record.)

By Mr. Montgomery:

Q. To read originally what was before you, and we only have one copy, would you like to read over my—to see that I do it correctly. This copy for Milestones came to you as follows: "Divorced" period, "Tire Heir Russell A. Firestone, Jr., 42, heir to the tire fortune, by Mary Alice Sullivan Firestone, 32," and then you insert, well, that's all right, "On the grounds of adultery," that's what came to you first; is that correct?

A. Yes, sir.

Q. And then you inserted, "One time Palm Beach," or "One time," and you put, "Where," for somebody to find out, "One time where school teacher." Was the fact that she had been a school teacher, was that of interest to you so far as copy was concerned?

A. It was a piece of information. We generally try and tell what people are and what they do for a living.

Q. Then it says, typewritten, "After six years of marriage," comma, "One son," semicolon, "In West Palm Beach, Florida," period.

And then it says down here, "During their seven month divorce trial the almond-eyed brunette, Mary Alice, her millionaire husband and over one hundred [338] witnesses testified to such an extramarital epic that, as Circuit Court

Judge James R. Knott observed, if everyone could be believed," dash, "Which Knott doubted," dash "Wifey's amours 'would have made Doctor Freud's hair curl,'" is that how that copy came to you?

A. That's what it says, yes, sir.

Q. So in the dispatches that you have had that you said you relied on for accuracy, there was in those dispatches, will you say now, where Judge Knott doubted this testimony?

A. Let me look at the dispatches again, please. May I?

Q. Yes, sir, the four that you said. These two and these two. Referring to Plaintiff's 4, 2, 7 and 8.

Mr. Frates: They have the Daily News article.

Mr. Montgomery: Excuse me, Your Honor. If there is an objection I would like for it to be made to the Court.

The Court: Yes.

Mr. Frates: I thought he asked for the dispatches.

The Court: If he doesn't get them all, you can put it in on recross.

The Witness: "Judge James Knott commented:

'According to certain testimony in behalf [339] of the defendant, Russell, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Doctor Freud's hair curl. Other testimony, in the plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr'." It goes on like that.

By Mr. Montgomery:

Q. Where does it say that the Judge doubts? This copy came to you where someone in the research testimony said that they doubted it.

A. That's the writer's copy.

Q. The writer had the same information you did, didn't he, sir?

A. Wait one second, please. In the Associated Press, in its decree, Judge Knott said he was inclined to discount much of the testimony presented in support of the divorce action.

Q. So your writer, which was a quote, "That the Court was inclined to discount much of the testimony," your own writer, in his own corporation, put before you this statement, "If everyone could be believed," dash dash "which Knott doubted," dash dash, "wifey's [340] amours," quote, " 'would have made Doctor Freud's hair curl,' " comma, "while Russ must have," quote, "bounded from one bed partner to another with the erotic zest of a satyr," that's what came to you, right?

A. Yes.

Q. So you knew that the testimony, so far as adultery was concerned, that was produced in this particular lurid divorce trial both was for Mr. Firestone and Mrs. Firestone on both behalfs which Judge Knott doubted, isn't that what your copy says, on behalf of both of them which the Judge doubted?

A. That's what this says here, yes.

Q. Then why did you pick out Mrs. Russell Firestone as having been convicted of adultery and not report it by Mr. Firestone?

A. Because that's what our subsequent—Mr. Firestone got the divorce and Mrs. Firestone's lawyer told Mr. Delaney that, "The technical grounds for divorce, according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery." In other words, Mr. Firestone won the action.

Q. Why did you not put down there that the Court found much of the testimony unreliable?

A. I didn't think it was necessary, sir.

[341] Mr. Montgomery: Your witness.

The Court: Anything else of this witness?

Mr. Frates: I don't have anything further, Your Honor.

The Court: All right, sir.

Mr. Frates: Is Your Honor going to have a recess? I want to take a matter up but I don't want to ask the jury to leave before we go on. It can be done at any time.

The Court: Do you have any further questions?

Mr. Frates: Oh, I'm sorry, no further questions.

Mr. Montgomery: I would like for him to be held subject to recall. I don't mean for him to stay in the Courthouse.

Mr. Frates: He will be available until the end of the trial.

Mr. Montgomery: Thank you, good.

The Court: All right.

(Witness excused.)

Mr. Montgomery: I thought Mr. Frates said he wanted——

Mr. Frates: No, I thought if Your Honor recesses——

The Court: Let's go ahead for a little bit more.

Mr. Frates: I can bring this matter up at any time.

[342] Mr. Montgomery: Just a moment, Your Honor, I have got to find this man's name.

The Court: Mr. Clerk, will you gather up all the exhibits?

Mr. Montgomery: Could we take a short recess, a five minute recess at this time?

The Court: I don't like to split them up so much.

Mr. Montgomery: I would appreciate it, Your Honor, we have been going for about an hour and five minutes.

The Court: All right, sir, but it's only ten minutes to three. You want about five minutes?

Mr. Montgomery: Yes, I would like five minutes or ten minutes to find the list of witnesses.

The Court: Let's just take a recess and we will go on for an hour or so.

Mr. Montgomery: I would appreciate it.

The Court: We will take about—do you have something you want to bring up something now or——

Mr. Frates: Judge, it can be done at any time. It's a technical matter, there's no need to change any of the procedure.

[343] The Court: Suppose we take a twenty minute recess.

(Thereupon, a short recess was taken.)

The Court: Are you ready to proceed?
Mr. Montgomery: Yes.
Mr. Frates: Yes.
The Court: Call the jury, please.

(Whereupon, the jury returned to the Courtroom and the following proceedings were had in their presence and hearing, to-wit:)

Mr. Montgomery: Your Honor, I have asked when Judge Knott will be available. He's in a hearing.

(Whereupon, proceedings were had out of the hearing of the Court Reporter and jury.)

Mr. Montgomery: Mr. Doerner.

THEREUPON, WILLIAM R. DOERNER, called as a witness for and in behalf of the plaintiff, after being by the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

[344] *Direct Examination by Mr. Montgomery*:

Q. Would you tell the Court and jury your name, please, sir?

A. William R. Doerner.

Q. And how old are you, Mr. Doerner?

A. 29.

Q. And where do you live, please, sir?

A. In New York City.

Q. And with whom are you employed, sir?

A. With Time, Incorporated.

Q. And what is your present position with them or duties with them?

A. My title is contributing editor and my duties are the writer in the World section concerning international news.

Q. What background do you have for writing? Did you go to school to learn?

A. I was a communications major in college and an English literature major in graduate school and I had three years on the St. Louis Democrat in St. Louis before joining Time.

Q. If you are twenty-nine now, this is 1970, how old were you in 1967 when this article in Time magazine for which we are here came about?

[345] A. Twenty-seven.

Q. And how long had you been with Time magazine at the time this article of December 22, 1967, came out about the Firestones divorce?

A. Approximately six months.

Q. Six months. And let me ask you this. Had you been with the Milestone division or part I guess you'd say of that magazine during this six months period?

A. For much of it, not all of it.

Q. For how much?

A. Much of it, not all of it.

Q. Excuse me, did you say four months or for much?

A. For much of it, more than half but not all the time.

Q. At the time on this Saturday of December the 16th of 1967, were you actually with the Milestones portion of the magazine at that time?

A. Yes, I was.

Q. Were you in charge or were you the chief pertaining to the writing of articles at that time?

A. I was the writer.

Q. What was, I understand that there was some testimony about somebody was on vacation or out of the office, something of that nature, who was he?

A. At the time that I had, that that article appeared, I had been shifted, I believe, to other parts of the [346] magazine primarily. The Milestones writer who replaced me was on vacation that week.

Q. Okay. Let's get back to that just a minute. When this article was written by you you were not at that time with the Milestones but you were with some other part of the magazine?

A. That's right, I was in kind of a transition period.

Q. Well, what transition, from where to where?

A. From having most of my duties in the Milestone section to most of them in sections, in other sections.

Q. In which section?

A. I hadn't been assigned to any specific section at that time.

Q. Could you say that you were an unassigned writer at this particular time when you were called in to write this first draft of this article?

A. No, I was assigned to one section or another at the beginning of every week.

Q. Oh, I see. So you went from one week to one thing and one week to another?

A. For a very brief period at the end of that year, yes.

Q. And I believe that you said you are presently associated with what portion of the magazine?

A. With the World section.

Q. The World section. Thank you, Mr. Doerner. Now, Mr. [347] Doerner, I show you a, I am referring, please, to Plaintiff's Exhibit Number 9 into evidence and ask you if you recognize it, sir?

A. Yes, this is the story that I wrote concerning the divorce of Mr. and Mrs. Russell A. Firestone, Jr.

Q. All right. You can just put that down. I will refer to it more in just a second.

Now, I want to ask you a little bit about how Milestone's section was done at the time you were associated with it in December of '67. In writing an item for Milestones section is there an attempt made to describe the event in full detail?

A. Not in full detail, there is an attempt to get the pertinent details in a compact form.

Q. And then would it be correct to say there is no attempt to describe the event in its fullest detail?

A. Yes, that's true.

Q. All right. And the item, it should be short; is that correct?

A. That's correct.

Q. And what about the facts contained in the article, how do you reach a conclusion about the facts in an article if you are going to synopsize it down?

A. How do you reach a conclusion?

Q. Yes, sir.

[348] A. What sort of conclusion?

Q. Well, what facts are relevant and what facts are irrelevant?

A. The stories that are done in Milestones are mostly important events in the lives of important people and the most pertinent facts about the events are the people themselves, of course, and they are what it is that has made them of wide interest to many Time readers, what they have done, what they are mostly known for.

Q. Do you also make comments?

A. Occasionally.

Q. All right, sir. Now, referring to this particular item here, upon what did you base this original draft of this article, Mr. Doerner, what source of information did you base that particular article on?

A. It's my recollection that there were two principal sources.

Q. Which were?

A. The Associated Press release, or the Associated Press wire copy from——

Q. Yes, sir.

A. Which gave the details of the divorce and a story that appeared in Saturday, December 16, issue of the New York Daily News.

[349] Q. I see. Didn't you use the report of your own people down here at your Miami Bureau?

A. Well, at the time the story was written we had asked our Miami Bureau to do their research on it and I wrote this from the other sources knowing that changes might or probably would be made when our own bureau had reported.

Q. What time did you write that article?

A. I don't recall specifically.

Q. Approximately what time, what time did you come to work that morning?

A. I was in the office all day.

Q. Well, what time did you come to work?

A. At ten o'clock.

Q. At ten o'clock. This is the first dispatch at 11:25 from Duncan to Applegate, your bureau down in Miami, you didn't see that?

A. Is this, is December 12 Saturday or Friday?

Q. That's a typographical error on the part of Time, it's been identified as December the 16th of 1967, it's stamped December the 16th of 1967. I believe it's been corrected.

A. Is that a Saturday?

Q. That's the Saturday.

A. Well, the article was written on Friday.

[350] Q. The article was written on Friday?

A. Before I left for home Friday evening.

Q. I see. And you say the article was written on Friday?

A. That is correct, that is the best of my recollection.

Q. What time Friday? What time did you leave home Friday, what time did you get off work?

A. At ten or eleven in the evening.

Q. You put in then twelve hours a day?

A. On Fridays, very often.

Q. I am talking not abou very often, I am talking about on Friday, December the 15th of 1967.

A. Yes, I believe I did.

Q. Do you know when this Court, His Honor Judge Knott actually, the time that this decree was filed?

A. No, I do not.

Q. Excuse me, the final judgment was filed?

A. No, I do not.

Q. And so you've got an AP dispatch I believe you said; is that correct?

A. That's right.

Q. Okay. I am referring now to Plaintiff's Exhibit in evidence, excuse me, Defendant's Number 1 in evidence, the AP dispatch. You did not have this; is that correct?

[351] A. Not on Friday the 15th.

Q. Did you come to work on Saturday the 16th?

A. Yes, I did.

Q. At that time did you have this or had you already written the article?

A. The first version of the article had already been written.

Q. Well, is that the first version, the one that I put before you as Plaintiff's Exhibit into evidence Number 9?

A. Yes, this is the first version.

Q. Did you ever do any more writing for that particular Milestones edition or was this your first and last effort so to speak?

A. No, I did further writing.

Q. Do you have a copy of what you did further?

A. There were changes made on the final draft.

Q. Did you keep those final drafts? You kept that first draft, where are the other drafts?

A. I do not have it.

Mr. Frates: That's in evidence, Your Honor, marked for identification, excuse me.

The Court: You can bring that up on your cross examination, show whatever you need to show.

[352] Mr. Montgomery: Sure. I would like to see everything marked into evidence.

The Court: All right.

By Mr. Montgomery:

Q. Did you, let's see, this is Defendant's G for identification, is this what you are referring to?

A. Yes.

Q. So you took the AP and some newspaper and then you wrote this first draft and then this is how it finally came out and how many times did you do it, just two times?

A. Yes, well, in effect two times, yes.

Q. Now, the final draft, which is this, in your original draft you says this, you says—you say this——

The Court: What exhibit is that, Mr. Montgomery?

Mr. Montgomery: I am sorry, sir, it's Plaintiff's Exhibit Number 9, I beg your pardon. Thank you, sir.

The Court: You're welcome.

By Mr. Montgomery:

Q. "Circuit Judge James I. Knott observed," coma, "if anyone could be believed," dash, "which Knott doubted," dash, "wifey's amours—" did you write that?

A. Yes, I did, only it is "If everyone."

Q. "If everyone could be believed," dash, "which Knott [353] doubted," did you get that from the AP dispatch?

A. No, not the specific wording.

Q. It was certainly—was it clear to you that the Court doubted this testimony?

A. It was mentioned in both the sources that the Judge, Judge's opinion said that, yes. Yes.

Q. Yes, but then you come back to this article right here which is the final draft and there's nothing about——

The Court: Which exhibit again?

Mr. Montgomery: Excuse me, Your Honor, which is Defendant's, that's for identification, the final article——

The Court: If we mention the exhibit each time, keep it a little clearer.

Mr. Montgomery: Defendant's Exhibit in evidence Number 5.

Mr. Frates: Your Honor, this has been identified, the exhibit here.

The Court: We can't use it if it's not in evidence.

Mr. Montgomery: That's the reason——

Mr. Frates: I have no objection if he wants to offer it into evidence, it is the final draft which is verbatim with the other one.

The Court: You want to offer it?

[354] Mr. Montgomery: Sure.

The Court: All right. It will be admitted, plaintiff's next exhibit.

The Clerk: Defendant's G for identification now in evidence as Plaintiff's Number 10 without objection.

(Thereupon, the document previously marked Defendant's Exhibit G for identification was received in evidence as Plaintiff's Exhibit No. 10 and made a part of the record.)

The Court: Now, you can use that one if you want, Mr. Montgomery.

Mr. Montgomery: What was that, 10, General?

The Clerk: Yes.

By Mr. Montgomery:

Q. This is the final draft, I believe, as it ultimately appeared in your magazine, or the magazine?

A. That is correct.

Q. All right, sir. Is there anything in there about the, there being any doubt so far as the Judge's findings were concerned or the testimony was concerned?

A. No, there's not.

[355] Q. I presume, Mr. Doerner, that when you as a writer for Time made that draft right there you submitted that to your senior editor for approval, did you not?

A. That's correct.

Q. That's the best you could do, I presume?

A. That was the best I thought I could do then.

Q. And you put in there what you thought was important for the readers of this particular country?

A. That's true.

Q. And it was important to you, I presume, Mr. Doerner, that the fact that the Judge doubted the testimony was important; is that correct, sir?

A. It was one of the facts mentioned in both my sources.

Q. It was an extremely—in other words, of all the facts, when you have to make it concise as you have already told us, that was a fact that you thought certainly should be included, right?

A. Yes.

Q. You likewise, put in some comment about, so far as the Judge was concerned, about Mr. Russell Firestone, as I understand your original here, saying Russell bounded from bed and so forth and all that language?

A. Yes, that's true.

Q. So you wanted it, you were giving both sides, right?

A. I gave a quote from the opinion about both parties.

[356] Q. In the final draft nothing about Mr. Russell Firestone, the heir to the Firestone fortune was not mentioned, was it?

A. Yes, both parties are mentioned in the final version.

Q. Does it say anything about him bounding from bed to bed or anything of that nature?

A. No, it does not.

Q. Now, let me ask you about—who was your senior editor at that particular time, sir?

A. Mr. George Daniels.

Q. And would you tell me what control he had over the final copy, please?

A. The function of the senior editor is to edit the writer, to make what changes are necessary either for purposes that are stylistic or because there is not enough room, for instance, for the number of lines that I wrote.

Q. There's not enough room, in other words, you delete things because there's not enough room in the magazine?

A. Occasionally we have to.

Q. Is that the reason that that particular item pertaining to doubts by the Judge of the testimony was deleted if you know, sir?

A. I don't know.

[357] Q. Could that be one of the reasons?

A. It might be.

Q. You submitted this original draft, I believe you said Friday evening sometime?

A. That is the best of my recollection, yes.

Q. And when did you work on the final draft of it?

A. Sometime Saturday afternoon or early evening.

Q. All right, sir. Now, what changes did you make from this? I notice that it says seven months and that says seventeen months. Did you find out all this information yourself?

A. Our bureau found out that specific point.

Q. I see. When you wrote—this is your—you left out here, on the original, it says on extreme cruelty and adultery but you left out extreme cruelty in your original draft there and you just have adultery down there, is that what you got from the file?

A. I was, when I wrote that original draft I was not working from the Time file.

Q. But when you wrote this final draft you were?

A. Yes.

Q. And when you wrote this final draft did you at that time have the AP dispatch? Did you have the AP dispatch at that time?

[358] I had had it then for twenty-four hours.

Q. And at that time did you have the report from your own people down in Miami?

A. That's right.

Q. When you got through with this—were you the last one that saw this before it went to the printers?

A. No, I was not.

Q. Who was the last man or last person to check it? Did it go back to the senior editor?

A. It did go back to the senior editor, I don't know beyond that.

Q. What ordinarily is the case?

A. The ordinarily—many stories also go back to the managing editor or the assistant managing editor.

Q. Thank you. One moment, please. Just a second. May I have just a moment, please?

Now, you correct me if I'm wrong because there's been so much testimony because I forget what one witness says to the other, it might be repetitious, so if I do, you correct me.

Did I understand you to say that at the final form you ulimately did have this report from the Miami Bureau?

A. Yes, we did.

Q. All right. Now, in that report it stated precisely [359] what the Judge had ruled, did it not, sir, the Judge ruled, that's what it says, doesn't it?

A. Yes, it does.

Q. What did that mean to you as a writer that the Judge had ruled colon quote, and then it says what the Judge ruled, did that mean anything to you?

A. It means that it came from his opinion?

Q. That was the decision, that was the Judge's ruling, wasn't it?

A. That's right.

Q. That's what it means. Then it says that "The Judge ruled: 'It is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication and the marriage should be dissolved,' " that's from your Miami Bureau; is that correct?

A. That's correct.

Q. Does it say anything in there pertaining to the fact that the Judge found or ruled Mrs. Mary Alice Sullivan Firestone guilty of adultery?

A. Well, it's my recollection that we have another file from the bureau.

Q. Well now, excuse me, sir, I understood your testimony that you had the AP report, some newspaper article and that at the time that the final draft was made, [360] did I misunderstand you?

Mr. Frates: Your Honor, he said he had the file and I think he is referring to this document as a file.

The Court: Little trouble unless he—you repeat your question. You were not answering his question. Could you repeat your question, Mr. Montgomery?

Mr. Montgomery: Yes.

By Mr. Montgomery:

Q. It was my understanding, and correct me if I'm wrong, sir, that at the time the final draft was made there was a newspaper article, the AP dispatch and at this time by the final draft you had the report from your Miami Bureau?

A. That is true.

Q. All right. Now, did you have something else?

A. I believe the Miami Bureau is contained in more than one section.

Q. Well, let me ask you this question. Upon what did you rely in the final draft of this article?

A. I relied upon the newspaper story, the Associated Press and the files that our bureau provided from Miami.

The Court: Let me ask a question. By files [361] now, and this is a trade name of these sheets of paper, it's not a folder like this?

The Witness: That is correct.

The Court: So when you say files, you are not meaning folder of material?

The Witness: That's correct.

By Mr. Montgomery:

Q. All right. What files, what do you mean by files, would you describe them? In other words, what was in the file, file in your vernacular, just these two other things, wasn't that the only thing——

Mr. Frates: Now, counsel——

Mr. Montgomery: That's correct, he's my own witness. I withdraw the question.

Mr. Frates: That's correct. He hasn't said that. I withdraw the objection.

By Mr. Montgomery:

Q. Was there anything else so far as the definition of a file from Time, Incorporated, was concerned other than those four papers?

The Court: You mean did he have anything else?

Mr. Montgomery: Yes, sir. No, sir, I am asking the identification of the file, in his vernacular,

did they consist of anything [362] other than those four papers because of the testimony of Mr. Daniels.

Mr. Frates: He has already testified twice on questions by him what he wrote in the original draft.

The Court: Now he's talking on the final draft.

Mr. Frates: Well, he had the others, also, Your Honor.

The Court: Let him answer that. I'd like to hear it. This is when you had the final draft, did you have anything other than the four pieces before him now.

Mr. Montgomery: Yes, sir.

The Witness: It is my recollection there is still another report from our Miami Bureau.

The Court: All right.

By Mr. Montgomery:

Q. Plaintiff's Exhibit Number 4 I am handing you, is that the other report?

A. Yes, it is.

Q. What is the hour of that report that's noted?

A. 1:25 P.M. Well then, and 2:02 P.M. on the other stamp.

Q. Then you had—excuse me. Plaintiff's Exhibit Number 2 at 11:25 on this Saturday, Plaintiff's Exhibit Number 4, which is 1:25 P.M., these two—what [363] was the other one?

A. This one.

Q. All right. Plaintiff's Exhibit Number 8 and Defendant's Exhibit Number 7, and this is what you had before you when you made that final draft of this article?

A. Along with the original sources which are the——

Q. The AP?

A. And the New York Daily News.

Q. New York Daily News, a newspaper clipping?

A. Yes.

Q. All right. You didn't rely on the newspaper clipping, did you?

A. For which version?

Q. For any version. Does Time, Incorporated, rely on another newspaper for accuracy and facts and truth?

A. For first versions occasionally.

Q. For final versions?

A. For final versions, no, never.

Q. Never. And we are talking about the final version right now. All right, sir. And Defendant's Exhibit Number 2 that you have before you, it said that the Judge quote ruled; is that correct, sir?

A. Yes.

Q. Furthermore, in Plaintiff's Exhibit Number 4 it says [364] again, quote, "The Judge, however, in quite a colorful opinion said that neither of them 'has shown the least susceptibility to domestication,'" is that correct?

A. Yes.

Q. There's nothing in here about the grounds of the divorce in these two, those are just corrections, right?

A. That's correct.

Q. Is there anything here in Defendant's Exhibit Number 1 that says that the Judge ruled that Mrs. Firestone was guilty of adultery?

A. No, but adultery is mentioned.

Q. I didn't say mentioned, I said did the Judge find and convict her of adultery, anything in that article, AP article, which you wrote in Time magazine in your final draft?

A. I am sorry——

Q. Did you write in your final draft that the grounds for divorce was adultery and extreme cruelty?

A. Yes, I did.

Q. Did that mean the Court had found her guilty of adultery and extreme cruelty?

A. Not necessarily.

Q. Oh. What did you mean by that?

[365] A. I meant that adultery and extreme cruelty were both causes in the granting of the divorce.

Q. All right, that the Judge ruled, is that correct, that's what you meant to imply to your readers, that the Court found that she was guilty of extreme cruelty and adultery; is that correct?

A. Well, we didn't say the Court found.

Q. What did you mean—I am not asking that, Mr. Doerner. You wrote the article, sir. What was your intention to convey to the public?

Mr. Frates: I don't want to go into technicalities, the witness is trying to courteously answer him. He said, and he tried to cut him off, he didn't say the Court found, he said the grounds were.

The Court: I'll sustain the objection because this is your witness.

By Mr. Montgomery:

Q. By the way, have I ever talked to you before except to say hello?

A. No.

Q. Have I had a conference with you or anyone from our office?

A. No.

Q. You likewise received a subpoena last night to come [366] here today?

A. Yes.

Q. Let me ask you if I can, to go to what you intended to convey, let me ask you this. Did you not intend to convey to the reading public that subscribed and purchased your

magazine on December the 22nd, 1967, that the Court or the Judge here in Palm Beach County, Florida, had found Mrs. Firestone guilty of adultery?

Mr. Frates: That's a leading question.

The Court: Objection sustained.

By Mr. Montgomery:

Q. State what you meant to convey by your article that ultimately and finally appeared in the December the 22nd, 1967, Time magazine?

Mr. Frates: Excuse me, are you finished?

Mr. Montgomery: Yes, I'm finished.

Mr. Frates: Your Honor, he's already asked this and the witness has already answered, he said we put in there the grounds, one of the causes in which the Judge ordered the divorce.

The Court: I am going to overrule your objection to this question now. Do you understand the question?

The Witness: I think so.

[367] *By Mr. Montgomery*:

Q. I will repeat it so you remember. What did you intend to convey to the reading public as a result of your final argument that appeared in your December the 22nd, 1967, magazine?

A. That Mr. and Mrs. Firestone, Jr., had been divorced, that the place and time were what they were, that he is, that he is the heir to a large fortune, that she was at one time a school teacher, that the grounds for the divorce were adultery and extreme mental cruelty.

Q. Now, when you say the grounds for divorce, what were you intending to convey to your readers by the word grounds?

A. That those were the grounds that were alleged over and over again in the trial and figured in the divorce, in the granting of the divorce.

Q. And found in the granting of the divorce?

A. And found—and what?

Q. And the Judge found that to be so, is that what you——

A. No.

Q. —you meant to convey, that the Judge——

Mr. Frates: Your Honor, again——

Mr. Montgomery: I beg your pardon.

The Court: He concedes that's wrong and he [368] withdraws it.

By Mr. Montgomery:

Q. Did you discuss this on the final draft with your superiors as to what the exact wording should be prior to the time that it was published?

A. Did I discuss with my superiors?

Q. Yes, sir.

A. No, I did not.

Q. Did you discuss these deletions and additions with your superiors prior to the final draft, or your senior editor?

A. I recall no discussion with my senior editor, no.

Mr. Montgomery: Thank you. Your Honor, at this time could I let the jury see this, Plaintiff's Exhibit in evidence Number 9 which they have not seen?

The Court: It's in evidence, if they haven't seen it pass it around.

Mr. Montgomery: It's short. Would you mind passing it around? And we have no further questions of this witness. I would like a little time for the jury to look at that.

The Court: All right. Take a look at that.

Mr. Montgomery: Thank you, Mr. Doerner.

The Court: Mr. Frates will have some questions.

[369] Mr. Frates: All right. I think all the jury has read it. May it please the Court.

Mr. Montgomery: Thank you. I will take that. You want to leave these exhibits up here, Mr. Frates?

Mr. Frates: Yes, please, Mr. Montgomery.

Cross Examination by Mr. Frates:

Q. Mr. Doerner, the manner that you handled this particular Milestone item, will you tell the jury whether this was in the normal manner that you handle items in Time magazine for Milestone?

A. Yes, it was, it was normal, it was just, it was in the same manner as most other Milestones that I wrote when I was there.

Q. All right. Is the Time up there, is the magazine itself?

A. No, it's not.

The Clerk: What do you want, the magazine?

Mr. Frates: Yes, sir.

By Mr. Frates:

Q. The final draft, Mr. Doerner, which, maybe if I take these and put them here, young lady, do you mind if I use this corner?

The final draft which is Defendant's G which you [370] wrote, is that the draft that was published?

A. Yes.

The Court: I believe it's in evidence.

The Clerk: It's now Number 10.

The Court: Plaintiff's 10.

Mr. Frates: Judge, I am going to get one of these G's or 10 right.

The Witness: Yes, that is the item.

By Mr. Frates:

Q. Does that say on grounds of extreme cruelty and adultery?

A. Yes, it does.

Q. All right. Does it say the Judge found that or does it say divorce was granted on grounds of extreme cruelty?

A. It says that the divorce was granted on those grounds.

Q. Now, before you wrote, referring to—it's all right.

The Court: People shouldn't be so jumpy.

By Mr. Frates:

Q. Before you wrote Plaintiff's Exhibit Number 9, which is the copy that you refer to, that's your first draft which you say was written on Friday?

A. That is the best of my recollection, yes, Friday afternoon or Friday evening, I think.

Q. All right. Friday evening. Now, will you tell the [371] jury what you had in your possession at that time?

A. At that time I had the Associated Press wire report and a story from the New York Daily News.

Q. All right. Is this Defendant's Exhibit Number 1 that you are referring to, is this the——

A. Yes, it is.

The Court: Is this the what?

Mr. Frates: Is this the AP report, Your Honor.

By Mr. Frates:

Q. Now, that came from of course Associated Press from West Palm Beach?

A. That's right.

Q. And it came in sometime on Friday the 15th. Can you tell us from that, approximately, when it came in, Mr. Doerner?

A. 6:52 p. m.

Q. All right, sir. Now, does that use, does that say the divorce was granted?

A. Yes, it does.

Q. And does it say——

Mr. Montgomery: Objection, Your Honor. It speaks for itself.

The Court: I think we have all gone over a great deal of what it says, it's very clear what it says. If you want to ask him some [372] of the details about it or how he got it or anything, that's all right.

By Mr. Frates:

Q. Does it say adultery in that article?

A. Yes, it does.

Q. And divorce was granted to Russell Firestone?

A. That's right.

Q. In the AP. You mentioned the other item of the New York News, is that correct?

A. That is it.

Q. And did you have that document?

A. Yes, I did.

Q. Before you drafted the original story?

A. Yes.

Mr. Montgomery: I object, that's not a document, it's a newspaper clipping.

The Court: We know it's a news article.

By Mr. Frates:

Q. Did you have that?

A. Yes, I did.

Q. And did that say——

Mr. Montgomery: Objection, Your Honor, that is not in evidence, if the Court please.

Mr. Frates: This is cross.

Mr. Montgomery: Yes, sir, but this is not in [373] evidence, it would be irrelevant and immaterial in the first place by reason of the fact he said he did not rely on the final draft of it and number two, it has not been put in evidence, not properly identified, if the Court please.

Mr. Frates: Your Honor, this is cross examination of the witness.

The Court: The thing is, Mr. Montgomery, it's true it's not in evidence but you asked him what he had and you are asking him if he had it on direct. I believe then on cross examination he can ask him, he can't read it but he can ask him if something was in it, that's all, I am not going to let him read it at this time nor can he put it in evidence at this time. But I think he's entitled to refer to it because of that.

Mr. Montgomery: All right. My objection is overruled.

The Court: Your objection is overruled, correct. Now, he can't read it.

Mr. Frates: No, I am not going to ask him.

The Court: You want to ask him one thing?

Mr. Frates: Well, two things, Your Honor.

[374] *By Mr. Frates*:

Q. That was the news item, we are talking about the New York News; is that right?

A. Right.

Q. And that was on Friday you had that document?

A. That's right.

Q. And did that indicate to you that Russell Firestone had been granted the divorce?

A. Yes, it did.

Q. And does it mention adultery in there?

A. Yes, it does.

Q. All right. And then based on that you wrote your initial story Friday?

A. That's correct.

Q. And there you used the term adultery?

A. I did.

Q. Which had been used in both the News and the AP?

A. That's correct, both my sources.

Q. And both of them had indicated that he had been granted the divorce, Russell Firestone?

A. That's correct.

Q. Was it then turned over to Mrs. Nadasdy, the researcher, to gather additional information?

A. It went simultaneously to Mrs. Nadasdy and to Mr. Daniels.

[375] Q. All right. Then referring to Plaintiff's Exhibit 4, from reading that did you determine what the grounds for the granting of the divorce were?

Mr. Montgomery: Excuse me, according to whom, if the Court please. That would be a conclusion of the witness or opinion of the witness. If he handed him the document, objection.

The Court: All right. Objection sustained to the form of the question.

By Mr. Frates:

Q. Did Time make an inquiry to try to find out what the grounds of the divorce were?

A. Yes.

Q. All right. Did you receive a reply to that further inquiry?

A. Yes, we did.

Q. And what was the reply to that inquiry?

A. To that specific inquiry it was, the grounds were given as extreme cruelty and adultery.

Q. Did it say where the source of that information came from?

A. Yes, it did.

Q. And who was that?

A. Joseph Farish, Jr., attorney for Mary Alice Firestone.

[376] Q. And on receipt of that did that satisfy you?

A. Yes, it did.

Q. May I have that back? And did you determine from your investigation that Judge Knott had commented that "According to certain testimony in behalf of the defendant, Russell, extramarital escapades of the plaintiff," who was Mrs. Firestone, "were bizarre and of an amatory nature which would have made Doctor Freud's hair curl"?

A. Yes, I did determine that.

Q. And were you also familiar with all of the other portions of the investigative file of Time magazine which you three worked together as a team on, those documents that we have in front of you?

A. Yes, all of these.

Q. Mr. Doerner, when you wrote the story did you think it was accurate?

A. I did.

Q. Did you think it was truthful?

A. I did.

Q. Did you know Mary Alice Firestone?

A. No.

Q. Were you trying to be as accurate as you could in the writing of this story for Milestone?

A. Yes, I was.

[377] Q. And did you believe the story as you wrote it?

A. I did.

Q. And do you have any indication that it wasn't true?

A. None.

Mr. Frates: I have no further questions, Your Honor.

The Court: That's all. Any redirect?

Mr. Montgomery: Yes, sir.

Redirect Examination by Mr. Montgomery:

Q. Mr. Doerner, as a matter of fact, by reason of that article, you believe that or do you believe that today?

A. Yes, I do.

Q. You believe that the Judge found Mrs. Firestone——

Mr. Frates: Again, object——

Mr. Montgomery: Withdraw it.

Mr. Frates: Object. He has made the statement and withdrawn the statement and again the witness has said, and there's not anything in there what the Judge found, he said the grounds are.

The Court: Mr. Montgomery withdraws the question and the jury I am sure knows if he withdraws the question there is nothing for them [378] to consider.

Mr. Montgomery: I forget, if the Court please, these are my witnesses sometimes.

By Mr. Montgomery:

Q. Let me ask you, did you have this before you in any kind of file, Defendant's Exhibit Number 6——no, excuse me, Plaintiff's Exhibit Number 6?

Mr. Frates: Mr. Montgomery, what is that?

Mr. Montgomery: That is the inquiry from Time magazine to the Miami Bureau.

The Witness: I believe I had a carbon copy of it, yes.

By Mr. Montgomery:

Q. And in that request they wanted the grounds of the divorce in the words of the Judge; is that correct?

A. Yes.

Q. Did you put the words of the Judge in there so far as his findings and where it says "ruled" down here, in any article, either the original, rough drafts or the final draft?

A. No, we did not.

Mr. Montgomery: Your witness.

Recross Examination by Mr. Frates:

Q. Mr. Doerner, did you rely on the information which [379] you had in your files that came from Mrs. Firestone's attorney who represented her in this divorce case as to what the grounds were?

A. That is correct.

Mr. Frates: No further questions.

The Court: All right. That all with this gentleman?

Mr. Montgomery: Yes, Your Honor.

The Court: You can step down.

(Witness excused.)

Mr. Montgomery: Your Honor, we will call Robert W. Delaney.

Your Honor, may I take up a matter, by reason of the fact that I would like for this witness to be

deemed a hostile witness, and I would like to show the deposition, I think we could do it probably side bar without letting the jury go.

The Court: You want the jury excused?

Mr. Frates: Your Honor, I don't want to be put in the position of asking these folks to leave the room to take up some trouble. I think he has no justification.

The Court: I think I will ask them to leave for five minutes maybe, we won't recess a long [380] time. Be back in a few minutes.

(Whereupon, the following proceedings were had out of the presence and the hearing of the jury.)

Mr. Frates: Your Honor, may I say that repeatedly through this trial, and I certainly, and I think the record will bear us out, we are certainly not trying to make this any personal issue, but repeatedly through this trial counsel has done things just like he's doing now, I want to declare him a hostile witness, I will show from the affidavit and things of that nature.

We have discussed that in front of Your Honor. Your Honor has already indicated that he was not a hostile witness or that he was not a managing agent, but right in front of the jury says he's a hostile witness, I want to declare him by what he said on the deposition.

The Court: I don't know whether he can declare him as a hostile witness or not, Mr. Frates.

Mr. Frates: What defense do we have of that?

That's telling the jury we think he's a [381] hostile witness, discount his testimony.

The Court: Oh, I don't think discount his testimony.

Mr. Montgomery: Excuse me, Your Honor, I would like for someone to make a suggestion how to do it, should I pass notes around?

The Court: I think we very often, counsel for the parties, say, Your Honor, I believe we should declare this man a hostile witness, as soon as he did I excused the jury. So if you feel you have been damaged I don't know what I can do at this moment.

Mr. Frates: No, I don't think we have been damaged, repeatedly through this trial counsel sits there and on two occasions counsel has made comments about the evidence in this case.

The Court: A lot of comments made by both counsel.

Mr. Montgomery: The original deposition was taken by Mr. Farish who was then counsel, it was taken on June the 9th of 1970, the first time. In this particular page, Page 37, Mr.—we almost had a fist fight down there, about punching in the nose and that [382] sort of thing, and secondly, when the second deposition was taken, if the Court please, Mr. Delaney was actually represented at that particular time by this particular firm now representing Time, Inc. He was given directions, he was given instructions not to answer, he was also, on behalf of the attorneys sitting there, at that time told about the waiving and reading of the signature, that it was waived on behalf of his counsel, that is, Mr. Frates' firm, and there is no question pertaining to this gentleman, Mr. Delaney's hostility. Now, all I would like for the Court to rule is that I might ask him leading questions, if the Court please.

Mr. Frates: Your Honor, the hostility was the question by Mr. Farish which—a repeated questioning about his personal affairs which Mr. Delaney resented and we stopped the deposition and left the room and sought a protective order from the Court which was granted. Judge Metzger handled that in Your Honor's absence.

The Court: I think I read that order.

[383] Mr. Frates: So how that could indicate any hostility to anyone——

The Court: What he wants to do is cross examine this witness. I am not anxious to tell the jury that he decided he was hostile, tell the jury in so many words, I will just let him, even if I declare him hostile——

Mr. Montgomery: I want the opportunity to ask him leading questions, if the Court please, and you can, don't tell the jury anything as far as that's concerned, but I do wish to have the opportunity to examine this witness by leading questions, if the Court please, and I don't think there's any question about the fact, Mr. Frates, Mr. Stewart was there, presently, that you did give him legal advice there, that you in fact did—well, wait a minute, no jury is here or anything.

The Court: Let him finish.

Mr. Frates: I know, but I been listening to him. Can't I make a face at him, Judge, if the jury is not here? Go ahead, Mr. Montgomery.

Mr. Montgomery: Wait a minute, Bill, what I [384] have said, as an officer of the Court, told the Judge, was in fact true, you did instruct him about waiving, reading, instructed him not to answer when I took his deposition in July.

Mr. Stewart: I waived the formalities at the conclusion of the deposition and as to a couple of improper questions you asked I said don't answer, as I would with any witness if you asked an improper question.

Mr. Frates: He is trying to ask Your Honor to declare him hostile and let him ask leading questions. There is absolutely, in my opinion, no justification for that in this case and counsel would like to do it, that's the only reason, I don't blame him, but there's no legal basis for it.

The Court: I don't think I can declare him a hostile witness from what I have before me right now. I would think, strange thing, the most convincing questions and answers that are ever asked any witness are the direct ones. I always think the leading ones are weaker.

So I think you can get your whole [385] testimony out from him very well. Now, of course, if he starts to refuse to answer questions or anything like that, I don't say that I won't declare him a hostile witness, but at this point I think you can get all your testimony in.

Mr. Montgomery: The only thing is, Your Honor, and I might say this in the absence of the jury, the witness has given me certain testimony in deposition, upon which I bank on at this particular time in calling him. Now, I don't want, and the reason I ask the Court to make this ruling, I don't want, in the middle of examination, for instance, to then ask the Court to declare him hostile. I don't know what's coming, I have tried to anticipate these things.

The Court: Let me put this proposition. The Court always assumes, first, that the witness will

tell the truth. You have his deposition. Now, if he contradicts something in his deposition, which is material, all you have to do is ask me if we can stop, you don't have to say anything more because it is possible in any witness that he can be [386] declared hostile.

Mr. Frates: I agree.

The Court: He assumes that he's going to say what he said in his deposition.

Mr. Frates: Your Honor, if he has the deposition, and he, on a material issue, just flatly reputes it, then I think there is a question of surprise. But there's no showing of that.

The Court: That's right. So what you do, all you have to say is, if you think, and by the way, well, at that time all you have to say is you would like to stop a minute and you come and hand me the deposition without saying anything, let me read it. Is that all right, Mr. Frates?

Mr. Frates: Yes.

The Court: And if we need more argument we will let the jury have some more exercise.

Mr. Montgomery: Thank you very much.

The Court: Ready, Mr. Delaney? I don't suppose we will get through with him this evening.

Mr. Montgomery: Your Honor, I was looking at the clock right now, I think he's probably going to be on probably an hour.

The Court: I think we should go on a while, if [387] we have to break his testimony we will just have to break it.

Mr. Frates: Your Honor, whatever——

The Court: I don't want to recess quite this early.

Mr. Frates: I would rather we go on if it's convenient to the Court, get as much as we can.

Mr. Montgomery: I will be as short as I can.

The Court: Fine. Have a seat, Mr. Delaney. Call the jury, please.

(Whereupon, the jury returned to the Courtroom and the following proceedings were had in their presence and hearing, to-wit:)

THEREUPON, ROBERT W. DELANEY, called as a witness for and in behalf of the plaintiff, after being by the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

Direct Examination by Mr. Montgomery:

Q. Would you state your name, please?

A. Robert W. Delaney.

[388] Q. What is your occupation, profession?

A. I'm a reporter and a radio broadcaster.

Q. For whom do you work?

A. For Time magazine, among others, and Radio Station WGBS in Miami.

Q. Well, who all else do you report for now?

A. No one else, at this particular time.

Q. Now, back in 1967 were you engaged as what is known as a stringer for Time, Incorporated?

A. That is true.

Q. What is a stringer?

A. A stringer is usually someone who's employed full time elsewhere and works in a part time capacity for Time magazine, if you are referring to Time stringers.

Q. I see. Now, presently, that is, today, you are not on that particular, or are you on that same particular pay arrangement?

A. Well, I am a stringer. I work part time for Time magazine.

Q. Well, are you not presently on a guaranteed annual salary?

A. I don't think, Mr. Montgomery, that it could be called a guaranteed annual salary. I have a guaranteed minimum of hours for the year, beyond which I can, depending on the number of hours I work, I'd be [389] compensated above that.

Q. In other words, they guarantee you that you won't make any less than you did, for instance, in 1969; is that correct?

A. That is correct.

Q. And when you were working as a stringer for them in 1967 were you paid hourly?

A. Yes, and I still am.

Q. All right, sir. And in addition, on this Saturday of December the 16th of 1967, were you, do you recall whether you were working hourly or not at that particular time?

A. Yes, I was working hourly. I might add this, that we had an arrangement on Saturdays where someone was on standby duty and there was no hours involved in particular on the standby duty. You were available then for calls on a Saturday in case anything came up at the last minute.

Q. And that was at home, wasn't it, Mr. Delaney?

A. That's correct.

Q. So far as this article about which you worked on and obtained the information that appeared in Time magazine December 22, 1967, are you familiar with that? You are familiar with that article, are you not?

A. Oh, yes.

[390] Q. And I believe, Mr. Delaney, was all the information obtained during the time that you are at home, did you ever get out in your car and go somewhere?

A. No.

Q. Was it all done over the telephone?

A. That's right, yes, sir.

Q. Was any of it recorded?

A. No.

Q. Did you make any file?

A. Oh, I made notes at the time.

Q. Did you make any file?

A. Well, I'm not quite sure I understand your question about a file. I made notes and I telephoned a report.

Q. Just a moment, if the Court please. Do you recognize this, sir?

A. Yes.

Q. Look at Paragraph 6. Do you mention "my files"?

A. Well, I think that term was used in a term of reference to the notes that I made during that day.

Q. When is that affidavit made, when was that affidavit made, sir?

A. I'll have to look for the date. September, 1968.

Q. Suit by Mrs. Mary Alice Firestone had already been instituted at that time, had it not, sir?

[391] A. Yes, sir, I believe it had.

Q. As a matter of fact, for what purpose was that affidavit made?

A. For that case.

Q. For this case here?

A. Yes.

Q. Yes. And was that made in behalf of Time, Incorporated?

A. Yes.

Q. And you did refer to your quote "files" in that particular affidavit, sir?

A. Yes, sir.

Q. Where are your files?

A. Well, as I say, I think when I used the term "my files" I think I had reference to the notes that I made that day.

Q. You said in the affidavit, did you not, sir, that you referred to your files in order to make that sworn affidavit, sir?

A. The files, Mr. Montgomery, in addition to my own notes were the files in the office of Time magazine which were copies of replies to the inquiries that were made from New York on that story.

Q. But you mention here at Page 2. "My files reflect that I talked personally." You are saying now that [392] they were not your files, they were Time, Incorporated, files?

A. I think the use of the word "my" was an all inclusive term in this case and not something that was my personal property.

Q. Well, Mr. Delaney, do you have, you said that you worked part time. Is it your—were you working full time at this particular time in December of 1967? Were you an employee of theirs?

A. No, not in the direct sense of being an employee. I was a stringer.

Q. Were you an employee in September of '68 when you filed that affidavit?

A. No, sir.

Q. Well, then, when you spoke in that affidavit of "my files," you said now that they are Time, Incorporated, files; is that correct, sir?

A. Well——

Mr. Frates: Your Honor, that supposedly is his witness, it's argumentative, talking about his files, talking about the files and the things that he did on this case.

The Court: Objection sustained. I think you can get the information from him with further questions.

[393] *By Mr. Montgomery*:

Q. Where are your notes now?

A. I no longer have them, Mr. Montgomery.

Q. What did you do with them?

A. Well, I'm sure they were thrown away a long time ago because the files that were in New York, and in the Time files in Miami, covered everything that I had in my notes.

Q. I believe you work also as a radio announcer?

A. I am a political editor of WGBS Radio.

Q. And you have worked as a disc jockey for radio for a number of years, haven't you?

A. Well, I was a disc jockey twenty-five years ago, Mr. Montgomery, before the term was ever used on a radio station here, but that's the only work I have ever done in that field. I have been in news since 1947.

Q. Well, what is this from 1955 to 1961, six days a week, WTTV?

A. I beg your pardon.

Q. From 1955 to 1961 were you in radio and TV at that time?

A. No. I was in television in Tallahassee.

Q. WTTV?

A. No, it's WCTV.

Q. WCTV, I beg your pardon. And what did you do for [394] them, sir?

A. I was sports director.

Q. And did you have a daily sports show?

A. Yes.

Q. And now you are on radio; is that correct?

A. With WGBS.

Q. In Miami?

A. Yes.

Q. And that's presently your home, Mr. Delaney?

A. Yes.

Q. Time, Incorporated, that's Time, Life, Fortune, Sports Illustrated, I think it is, are you stringers for all of those books or magazines?

A. Most of my work has been for Time, I have done work for Fortune and Life and Sports Illustrated over the years.

Q. Does Life, the magazine, that is, and Time, the magazine, share quarters in Miami, sir?

A. No, they do not.

Q. Did they in 1967?

A. Yes, they did.

Q. Now, you were also in West Palm Beach, Florida, for a number of years, were you not, sir?

A. Something less than six years.

Q. All right, sir. And during that particular time as a [395] reporter did you cover Court proceedings?

A. To some degree from 1947 until I left here in 1950.

Q. Well, my question was, did you cover Court proceedings during the time that you were here?

A. Yes, yes, between 1947 and 1950.

Q. And presently where is the office of Time located, in Miami, that is?

A. Well, the Miami Bureau, as such, was closed down in January of this year.

Q. I understand that. Where is the Time office located at the present time?

A. Well, there is no Time office, as such.

Q. Well, what is at 244, the Courthouse down there in Dade County in Miami, Florida?

A. Well, if you want to know where I am located, Mr. Montgomery, my desk is in the Dade County Courthouse.

Q. I see.

A. Room 244.

Q. All right, sir. So presently in working for Time you work out of the Courthouse at a room there; is that correct?

A. In the Press Room.

Q. In the Press Room?

A. That's correct.

Q. Now, in making your, doing your reportorial work, is [396] that the right——

A. Fine.

Q. Did you have an occasion from time to time to cover divorce cases?

A. I think an occasional one, yes.

Q. Do you know at this time that a woman that has been convicted or found guilty by the Judge of adultery receives no, can receive no alimony, Mr. Delaney?

Mr. Frates: Your Honor, again we are back to the same thing. We object to that.

The Court: You object to that?

Mr. Frates: On the same grounds.

The Court: Objection sustained because of the ruling I have made, we are going to handle this later. Objection sustained.

Mr. Montgomery: May I be heard one more minute on it? I will approach the bench if necessary.

Mr. Frates: Your Honor——

Mr. Montgomery: Nothing I can say I presume, that—in other words,——

The Court: No, at this point, I made that ruling and I will not change it at this point so the objection is sustained.

Mr. Montgomery: All right, sir. Thank you.

[397] *By Mr. Montgomery*:

Q. Now, who did you work for out of that particular office, who was your immediate superior?

A. Which office, Mr. Montgomery?

Q. In Miami on December the 15th and 16th of 1967.

A. Mr. Richard Duncan was the bureau chief at that time.

Q. For Time, Incorporated?

A. Yes, for Time magazine, not for Life.

Q. All right, sir. Now, as a result of a conversation with Mr. Duncan, did you make certain inquiries pertaining to the Firestone divorce decree?

A. Yes, I did.

Q. Did you ever see that decree prior to the time that you sent your last dispatch to New York? I think it was 1:25 p.m. on December the 16th of 1967.

A. Would that have been a Saturday?

Q. Yes, sir.

A. No.

Q. When is the time that you finally did see the final judgement of divorce in that case, Firestone versus Firestone, or have you ever seen it?

A. I had portions of it read to me on that Saturday that you speak of. I did not see it that Saturday and I'm not sure that I have ever seen it.

Q. All right, sir. Did you receive an inquiry from the [398] Miami, excuse me, from the New York office of Time inquiring specifically of specific things that they wanted you to find out, sir?

A. Well, I think this was relayed to me by Mr. Duncan.

Q. Well, let me ask you this, sir. Without getting the Exhibit do you recall whether or not the New York office wanted the marriage date of Mr. and Mrs. Firestone, was that one of the things?

A. I think that may have been, I'm not sure, I'd have to look at the file.

Q. In any event, there is no question about the fact, is there, Mr. Delaney, that one of the inquiries was they wanted you to find out the grounds for the divorce granted in the words of the Judge?

Mr. Frates: Excuse me, Your Honor. This is a leading question, statement by counsel.

The Court: Objection sustained.

Mr. Montgomery: All right, sir.

By Mr. Montgomery:

Q. State everything that Time from New York wished you to determine so far as the Firestone versus Firestone divorce was concerned as you recall?

A. I'm afraid I can't do that, Mr. Montgomery, without looking to the record.

Q. All right, sir.

[399] A. I could try but it would be merely guessing, I have worked on hundreds of stories since then. I recall there were several questions but what they were I do not know. I think one pertained to a child's name.

Q. The child's name?

A. As I recall, but once again I am relying on memory.

Q. All right, sir. Let me refresh your recollection here, sir.

A. This looks like the inquiry that came into the bureau and was relayed to me by Mr. Duncan.

Q. Was one of the inquiries that was asked you by New York City, that is, Time, Incorporated, I presume that's where that emanated from, am I correct in that, sir, Applegate or whatever it is?

A. Yes.

Q. Would I be correct—excuse me, strike that. Then you are asked by Duncan, among other things, to find out the grounds of the divorce in the words of the Judge; is that correct, sir?

A. One of the questions here is: "Need the grounds on which it was granted in the words of the Judge."

Q. All right, sir. Did you undertake to do that, Mr. Delaney?

A. Yes, I did.

Q. All right, sir. Now, I show you your dispatch of [400] 1:25 p.m., Plaintiff's Exhibit Number 4. Is this the dispatch that you sent up there or sent up after your investigation?

A. It appears to be, yes.

Q. That's a verbatim report, would it not be, sir?

A. That's what it looks like to me.

Q. Because on the other end it's recorded; is that correct?

A. That's right.

Q. Did you quote the ruling of the Judge when it says down here, Plaintiff's Exhibit Number 4, where you mention Mr. Farish, then you said, "The Judge, however, in quite a colorful opinion said that neither of them," and then you have quotations, quote, "has not shown the least susceptibility to domestication," or whatever it says there; is that correct, sir?

A. Yes, I was quoting from the opinion.

Q. All right, sir. And that you were asked the grounds in the words of the Judge and consequently——

Mr. Frates: Your Honor, this is argument.

Mr. Montgomery: Beg your pardon. I withdraw it.

Mr. Frates: Argument, leading questions.

The Court: He realizes he slipped there.

Mr. Montgomery: Sorry I have to be reminded.

The Court: You are correct, Mr. Frates. He [401] withdraws it. He will rephrase the question.

By Mr. Montgomery:

Q. Did you make an effort in order to determine the grounds for the divorce in the words of the Judge pursuant to the direction from New York and through Duncan?

A. Yes.

Q. All right, sir. Thank you. Where did you receive that direct quote from, Mr. Delaney, since you didn't have the Court's order?

Mr. Frates: Well, Your Honor, I assume that he can, he's asking you did you make an effort and he said yes, and I assume he has a right, I will sit down, assume he has a right to skip over that.

The Court: I think so, this is his witness and he doesn't have to ask him anything he doesn't want to. You can cross examine him if you think something else should be brought out.

Mr. Montgomery: I am sorry.

The Court: No, that's all right, you go ahead the way you want to.

Mr. Montgomery: I will bring out everything if I can.

[402] The Court: You question him on what you think is material.

By Mr. Montgomery:

Q. You got this exact phrasing from the judgment, where did you get it?

A. My recollection, Mr. Montgomery, is that I got it first from Mr. Farish who was then representing Mrs. Firestone.

The Court: He says it's his recollection he got it first from Mr. Farish. I don't think we are to the point yet.

By Mr. Montgomery:

Q. Are you positive you got that from Mr. Farish?

A. No, I said my recollection was that I got it from Mr. Farish. It's been a long time, Mr. Montgomery, and I talked to a number of people that day in an effort to get a hold of the Judge and——

Q. What other sources may you have, could you have possibly gotten it from, say one of the attorneys, either Mr. Farish or some other attorney?

A. It's possible, I tried to locate any attorneys that I could find who were involved in the case. I tried to locate the Judge.

Q. Did you know at that particular time that Mr. Floyd of Frates, Fay, Floyd and Pearson had represented Mr. [403] Russell Firestone in the divorce?

A. I think I learned that during the day as I was trying to run this thing down, and I think I tried to reach Mr. Floyd but unsuccessfully.

Q. Then consequently you knew if you tried to reach Mr. Floyd or did you know they were involved as the lawyers for Russell Firestone?

A. I have no clear recollection of where I learned that Mr. Floyd was involved but I had known Mr. Floyd for years and when his name was mentioned I tried to reach him. I don't think I was successful, as I remember. But I did reach Mr. Farish.

Q. Now, after you put this article in, this is the last thing you had to do with this particular Firestone versus Firestone divorce case, when you sent up that to New York?

A. Well, I talked to the Judge later that same day.

Q. Please listen to my question. So far as sending any material or calling any material into New York, after this 1:25 dispatch, did you send any more information up to these people in New York?

A. I don't think so.

Q. So from your recollection after 1:25 recording you had nothing more so far as Time, Incorporated, is concerned, to do with the Firestone versus Firestone [404] divorce case, at all, until the article was published?

Mr. Frates: Again, Your Honor, this is argumentative and leading.

The Court: It's sort of leading but I think he asked him did he have anything more to do.

Mr. Frates: I think if he asks him that but not to argue.

By Mr. Montgomery:

Q. Did you send them any more information after that dispatch?

A. No, I thought we had done everything that needed to be done to get the true facts and that that was all that I needed to do on it.

Q. Now, you of course—strike that, please. Withdrawed that.

This final, I'll call it the final dispatch, the final thing you did for this article, in light of the inquiries made, you had not talked to Judge Knott at that time, had you?

A. No, sir, I had not.

Q. You didn't talk to Judge Knott until late in the afternoon, late afternoon?

Mr. Frates: Your Honor, again—excuse me, Your Honor. I don't want to keep jumping up. He's leading, arguing with the witness. [405] It's improper, he knows it.

The Court: I don't think he is arguing. It is a leading question. Mr. Montgomery, before you phrase a question, this is your witness, think it over carefully. You have got to ask him direct questions, not leading questions.

Mr. Montgomery: I apologize, Your Honor. I recognize I'm guilty as judged.

By Mr. Montgomery:

Q. Mr. Delaney, what time did you talk to Judge Knott?

A. I think it was late in the afternoon or early evening. I don't recall exactly what hour.

Q. When you talked to him did you have a copy or notes pertaining to what the Judge said, his opinion said, so far as his ruling was concerned?

A. Yes, and doubled checked with the Judge to be sure that what I had said was an exact quote from his opinion.

Q. Did Judge Knott ever tell you that he granted this divorce on grounds of adultery?

A. I don't remember, I don't think so because I don't think I asked him that question.

Q. Now, you said you don't think so, you don't remember. Did, from your recollection, Judge Knott ever tell you that he granted the divorce to Russell Firestone [406] on the grounds of adultery?

A. As I said, I don't think so.

Q. Thank you, sir. Did you check the alimony given to Mrs. Firestone?

A. Yes, I think I checked that with Mr. Farish, along with other questions.

Q. Were you warned by Mr. Farish about being accurate by reason of a previous lawsuit filed by Time, Incorporated?

A. I have no memory of that.

Q. Well, then, do you deny that you were warned?
A. No. I have no memory of it.
Q. You may have been and forgotten it?
A. Well——
Q. That's leading. I withdraw it.

The Court: Withdraw it. I think he's answered your question.

By Mr. Montgomery:

Q. Now, I think I ask you, in 1967 you did do some work for Life magazine, did you not, sir?
A. Very seldom.
Q. But you did do some, that's my question.
A. Very little.
Q. Well, a very little, did you do any work for Time or Life in 1967?

[407] A. To be quite honest, Mr. Montgomery, I would have to go back and look in my income tax files or perhaps in the Time pay records somewhere to find if I did any at all because Life had their own people.

Q. What is your best recollection?

A. Let me think about it a moment. This was during the year 1967. Over the years I worked for, from 1955 for all of the magazines but I have no specific recollection at this moment of a given story that I worked on for Life in 1967. I may have, but——

The Court: Mr. Frates, would you approach the bench?

Mr. Frates: Surely.

(Whereupon, proceedings were had out of the hearing of the Court Reporter and jury.)

The Court: All right. You go ahead, Mr. Montgomery.

By Mr. Montgomery:

Q. Let me refresh your recollection. Would you look at that, pertaining to 1967, sir?

A. Are you referring to the statement where I said I did a very limited amount of work for Life?

Q. Yes, sir, did you do work, any work for Life during the year 1967?

[408] A. Well, I can only repeat my previous answer, Mr. Montgomery. I have no specific recollection of any given story that I might have worked on for Life. Now, I will not say that I did not work on a story for Life because I can't recall.

Q. Well, Life is owned by Time, Incorporated; is that correct?

A. Yes, Life operated independently, however. In the same suite of offices.

Q. You recall on June 9, 1967——

Mr. Frates: There is no inconsistency in that and we are making a mountain——

The Court: I am going to let him ask it.

Mr. Frates: I contend it's not inconsistent.

The Court: This is his witness, I am going to ask him if he recalls that statement.

The Witness: I am not trying to be evasive, Mr. Montgomery.

The Court: You don't have to justify yourself, he's going to ask you another question.

The Witness: I just don't recall.

By Mr. Montgomery:

Q. Mr. Delaney, on June the 9th, 1970, I believe Mr. Farish took your deposition; is that correct, sir?

A. That date sounds correct.

[409] Q. I will ask if these questions were asked and did you make this answer, and Mr. Frates, I am going to

start and I will read and tell you the questions if you have an objection, Page 30, Line 18, through the question——

The Court: What did you say, Mr. Frates?

Mr. Frates: I say, I don't know whether that has any relevancy or materiality but I won't object to it.

The Court: All right. He doesn't object, go ahead and read it, Mr. Montgomery, just for this narrow thing.

Mr. Montgomery: Yes, I understand Your Honor's ruling.

Mr. Frates: On that basis then, this doesn't come within the ruling at all.

By Mr. Montgomery:

Q. Let me ask you this question. Did you say I did a very limited amount of work for Life during the year 1967 when your deposition was taken in June the 9th of 1970, did you make that statement?

A. I may very well have.

Q. Did you make it under oath, was it your best recollection?

A. Yes, and its still my best recollection. I may have done some work for them. I don't recall a specific [410] story.

The Court: All right, fine. I think that takes care of it.

By Mr. Montgomery:

Q. Now, the fact—strike that, please. This, in your work for Time magazine, is this space in Time rather vigorously competed for throughout all the World?

A. Are you asking for an editorial opinion on the readership of the magazine, Mr. Montgomery, or what? I am not sure I understand your question.

Q. I am asking about a response——

A. Well, my answer here, or my statement is simply this, the space in Time is vigorously competed for all over the World and many stories are worked on that never get printed. If I may explain that.

Q. No, sir, I am just going to ask you some questions so far as——

The Court: He is going to ask questions, Mr. Delaney, just let him ask the questions.

By Mr. Montgomery:

Q. Now, therefore, on Saturday were you aware that there was some deadlines problems with this particular article?

A. Saturday is always the deadline for the magazine.

Q. Were you aware of that in 1967, December the 15th and [411] 16th, Mr. Delaney?

A. Yes.

Q. All right, sir. Did you therefore understand that all the material and efforts had to be made, rather, you didn't have a lot of time to work on it; is that correct?

A. Quite true.

Q. And the portions of the Judge's order you got over the telephone as you recall; is that correct, sir?

A. Yes.

Q. And you really don't remember from whom; is that correct?

A. My best memory is that I got most of the language from Mr. Farish.

Q. And——

A. I think perhaps I may have gotten some of it from the Associated Press now that I'm thinking about it.

Q. I see. Now, Mr. Delaney, how would you get this information from the Associated Press, call them?

A. I have a recollection that I may have called the AP office in Miami to check against what I had and double check and see if it was the same thing.

Q. And they gave you the whole AP and quotations from the Judge at that time?

A. Once again, I say I'm not certain that that was the [412] case but I vaguely recall calling the AP office to double check the wording.

Q. Well, have you ever done any more work so far as the accuracy of this final judgment for Time, Incorporated?

The Court: Any more after when?

Mr. Frates: I object to that, Your Honor. I don't know what——

By Mr. Montgomery:

Q. Let me ask you this. Subsequent to December the 16th of 1967——

Mr. Frates: Your Honor——

Mr. Montgomery: Let me ask the question.

Mr. Frates: I am sorry.

By Mr. Montgomery:

Q. Subsequent to December the 16th of 1967 have you ever given any more information pertaining to the Court's order to Time, Incorporated, or any of its agents, servants or employees?

The Court: Don't answer yet.

Mr. Frates: Your Honor, Judge Metzger has already ruled on this matter, the letter was delivered December the 16th, that they were to proceed, and——

The Court: I am going to overrule the objection. [413] I will let him answer whether he did or he didn't, period. Did you?

The Witness: It seems to me that I had a request to get a copy of the opinion and got it from Judge Knott, I'm not positive, but I rather think I did.

By Mr. Montgomery:

Q. When was this?

A. I don't remember.

Q. Sir?

A. I don't remember.

Q. Was it after the article was published?

A. I think so.

Q. Is there any question in your mind about it?

A. No. It was some time later, you ask me about any subsequent event.

Q. You said you think so, I am questioning as to whether or not there was any question in your mind after the article was published that you were asked by New York or Time in New York that you were asked to get a copy of this decision?

A. No.

Q. It was after the publication?

A. That's correct.

Q. Have you done any more work so far as the Firestone [414] versus Firestone divorce case is concerned and done any reporting of your findings to New York since December the 16th, 1967?

A. No.

Q. Now, when you say that you thought that you might perhaps have gotten the wording of the language from one of the attorneys, did you talk to the attorneys for Russell Firestone or any of them?

A. Well, again, Mr. Montgomery, we are talking about——

Mr. Frates: Your Honor, excuse me. This is the third time that we have been over this particular phase of——

The Court: Didn't you ask him before?

Mr. Frates: Yes, sir, on two occasions.

Mr. Montgomery: No, sir, I have not, as I recall, and I wish Your Honor's indulgence to let me ask this one more time.

The Court: Didn't you ask him about it? Nothing improper about the question.

Mr. Montgomery: I can't remember.

Mr. Frates: I withdraw the objection, save more time.

The Court: The only objection it could be would be repetitious.

Mr. Montgomery: If I have, I am sorry.

[415] The Court: All right. Mr. Frates withdraws his objection.

By Mr. Montgomery:

Q. When you said that you talked to quote one of the attorneys, close quote, did you talk, from your recollection who did you talk to so far as the other attorneys concerned other than Mr. Farish?

A. I don't think I reached any other attorney.

Q. What did you mean by the word, when you said I talked to one of the attorneys?

A. I imagine I had reference to Mr. Farish.

Q. I see. Now——

A. I tried to reach several attorneys, Mr. Montgomery, and I don't remember reaching any one but Mr. Farish.

Q. Mr. Delaney, your recollection pertaining to these events are rather, it's been sometime, do you have difficulty remembering?

A. No, no, I've just worked on an awful lot of stories.

Q. And when your deposition was taken by Mr. Farish back on June the 9th of 1970 did you have to rely on this affidavit that you gave, you had no independent recollection of the events?

A. I don't recall that I had to rely on that, I may have. I may have relied on it, be accurate about dates.

Q. Page 22, Mr. Frates. I will ask you again, Mr. [416] Delaney, so far as your recollection concerning the events of December the 16th of 1967, at the present time are they vague in your mind? May I have that back, please?

A. No more vague than anything else that might have happened three years ago.

Q. Well——

A. But I, there are things that I don't recall distinctly about it.

Q. Well, what, you mentioned the conversation, Mr. Farish, what was that conversation?

Mr. Frates: I'll—go ahead, I withdraw it.

The Witness: Well, as I remember it I asked Mr. Farish if he represented Mary Alice Firestone.

By Mr. Montgomery:

Q. And what did he say?

A. He said that he did.

Q. All right, sir.

A. And I asked him if he had a copy of the opinion the Judge had handed down.

Q. What did he say?

A. And he said he did and I asked if I could check some of the wording with him, and he would give me some of the phrasing from the opinion, and I recall that he [417] did give me some of it. I also asked him if it was true that Mr. Firestone had filed suit charging adultery and extreme cruelty.

Q. What did he say?

A. And I recall he replied yes.

Q. All right.

A. And I asked him if it was true that the Judge had granted the divorce to Mr. Firestone and my recollection is that he told me the technical grounds, yes, that the divorce was granted to Mr. Firestone.

Q. Well, did you say something about the technical grounds or did he say it?

A. My memory is that he did.

Q. In other words, who mentioned technical grounds, Mr. Farish or you, sir?

A. Who used the term first I can't say. I may have used the term first and he may have said yes, or he may have used it first.

Q. You just really don't recall?

A. I don't receall who used the term first.

Mr. Montgomery: Your witness.

The Court: All right. Cross examination going to take very long?

Mr. Frates: No, sir.

The Court: All right.

[418] *Cross Examination by Mr. Frates*:

Q. Where was Mr. Farish when you talked to him, Mr. Delaney?

A. At his home.

Q. And when you, after you talked to him you then sent this dispatch on December the 16th at 1:25, "The technical grounds for divorce according to Joseph Farish, Jr., attorney, were given as extreme cruelty and adultery"?

A. That's correct.

Q. And that's the information that you forwarded on to Life after talking with Joe Farish?

A. To Time.

Q. Did you believe that after talking with him?

A. Yes, indeed or I would not have filed it.

Q. All right, sir. Of course there wasn't any—I withdraw that. Now, will you tell these ladies and gentlemen of the jury what you tried to do in contacting Judge Knott when you first got the inquiry?

A. Well, I called——

Q. He skipped over that question.

A. I called Judge Knott's home several times.

Q. Mr. Delaney, let me ask you this. Did you know Joe Farish, Jr., personally, you had lived here, I think?

[419] A. Yes.

Q. And did you know Judge Knott?

A. Yes, I did.

Q. All right. Now, go ahead and tell these folks what you did after you got the inquiry from New York?

A. I called Judge Knott's home first, several times, received no answer. Then I called a neighbor of his, I happened to know where he lived, and I called one of his neighbors and asked the neighbor if they had any idea whether the Judge was away for the weekend or might just be out for the day or if they would have any idea where I might locate him.

Q. Do you know who the neighbor was or the name?

A. Yes, I do.

Q. And who was that?

A. Well, I called Judge F. A. Currie and I talked with Mrs. Currie.

Q. All right.

A. And Mrs. Currie didn't know but said that she would be happy to keep an eye out for the Judge, or Mrs. Knott, and ask them to call me at the first opportunity.

Q. Later that day did Judge Knott call you?

A. Yes, he did.

Q. And did he read to you or did you ask him to read portions of the decree?

[420] A. Yes.

Q. His final judgment, we are calling it a decree.

A. Yes.

Q. Now, you had sent the story in, or that dispatch prior to that?

A. That's correct.

Q. And from your conversation with Judge Knott was there any information that he relayed to you that was inconsistent in any way with the telephone information you had forwarded to Time, Inc.?

Mr. Montgomery: Conclusion, objection, opinion.

The Court: I'll let him answer that.

By Mr. Frates:

Q. Plaintiff's Exhibit 4, wherein you related——

The Court: We know what he related.

Mr. Frates: All right, sir.

The Witness: No, there was no inconsistency or I would have called New York immediately and advised them of the same.

By Mr. Frates:

Q. Did you know Mary Alice Firestone?

A. No, sir, I have never met the lady.

Q. Did you believe the information that you sent in was correct and truthful and accurate?

A. Yes.

[421] Do you recall approximately what time of day that you talked to Mr. Farish?

A. I would guess it was somewhere around noon, late morning or very early afternoon.

Q. And after the conversation with him and looking at that exhibit in your opinion was that accurate, correct?

Mr. Montgomery: Calls for an opinion, objection.

Mr. Frates: Talking about the facts.

The Court: I think you have asked him if he—well, objection overruled.

By Mr. Frates:

Q. All right. After talking to Mr. Farish——

The Court: I think you asked him did he believe him to be correct.

Mr. Frates: Yes, now I am asking if there are any facts in there that weren't correct and accurate as far as you were concerned in the dispatch that you sent.

The Witness: Well, I sent this subsequent to my conversation with Mr. Farish.

By Mr. Frates:

Q. Right. And then the question with the Judge?

A. That's true.

Q. All right, sir. Now, on the basis of those two [422] conversations was there anything in that report that you felt was incorrect?

A. No, sir.

Mr. Frates: No further questions.

The Court: Anything else?

Mr. Montgomery: Yes, sir, just two questions.

Redirect Examination by Mr. Montgomery:

Q. In that report, Mr. Delaney, that you sent to New York, you gave words that you attributed to Mr. Farish.

Mr. Frates: Excuse me, Your Honor. This is supposed to be redirect and it says what it says, as Your Honor has told me not to read it, and I think it ought to apply to him, it's an argumentative question.

The Court: I can't agree, Mr. Frates. You asked him about his conversation with Mr. Farish and then he sent this. He is asking if he sent words which he attributed to Mr. Farish.

By Mr. Montgomery:

Q. You identified as Mr. Farish's words?

A. Yes.

Q. And then you said in there, in quotations, you [423] identified the Judge's words when you said, "The Judge, however——"

The Court: Well, this point——

Mr. Montgomery: He identified the Judge's words also.

The Court: Just a moment. This point I remember distinctly you have already asked him and he has distinctly answered it on direct.

Mr. Montgomery: All right, sir. If I did, thank you for reminding me.

The Court: Let's not repeat it. He answered it on direct.

By Mr. Montgomery:

Q. Mr. Delaney, you did what New York asked you to do, did you not, sir?

A. Yes, sir, to the best of my ability.

Mr. Montgomery: Thank you. No further questions.

The Court: Is that all?

Mr. Frates: No questions.

The Court: Thank you, Mr. Delaney. You can step down. Gentlemen, we are going to recess at this time——

Mr. Frates: Your Honor, may I ask, Mr. Delaney has other commitments. Can he be released?

Mr. Montgomery: Yes, he may be released.

[424] The Court: You can be released from your subpoena, you are not under subpoena any more.

(Witness excused.)

Mr. Frates: The other three of course we will keep here.

The Court: Yes.

Mr. Montgomery: I frankly don't think I will—well, I'll——

Mr. Frates: As long as he can get back to his permanent job.

The Court: Let me make the statement so he'll understand. Mr. Delaney, you are released from your subpoena, you are no longer under subpoena and the Court will release you.

Mr. Delaney: Thank you, sir.

The Court: Gentlemen, the jury has inquired here for me to make a guess merely for their reason of making personal plans as to how long, further we will be. Let me make a statement. If you gentlemen wish to say any difference, why say.

We are just trying so they can plan, they are not saying anything, they want to [425] make their plans. Is that right?

Mr. Sailors: Yes, sir.

The Court: I would think offhand all the testimony will be finished sometime tomorrow.

Mr. Montgomery: I don't think there is any question about it in my mind.

The Court: Do you feel it will be finished, the testimony?

Mr. Frates: Your Honor, I would hope it would be finished by noon. The answer to the question is yes.

The Court: The jury realizes I can't tell them definitely, I ean't tell them definitely. We are giving them our best guess. Our guess would be we would be finished sometime tomorrow.

Now, this case is the kind of a case in which all the testimony when finished there's going to be quite a lapse of time for legal questions and conference under the rule with the attorneys as to the charges I give so it's going to take quite a lot of time, so what I am hoping is that the testimony will be finished and at such a [426] time, and when we do all these things they can be done so you won't be in the juryroom. So my total guess will be, that the case will wind up sometime Friday because we have the charge conference and my charge on the law.

Mr. Sailors: We didn't know whether it was a hundred more witnesses or twenty-five or five.

The Court: No, we are coming close to the end of the testimony. I would feel very confident that this case will go to you for decision sometime Friday.

Mr. Frates: Well, Your Honor, as counsel has stated he has called the Time people here, so we are really going through this case, I don't see any reason why tomorrow afternoon we shouldn't be through with all the testimony.

The Court: We will do all this legal stuff instead of having you sitting in the juryroom, you can go home and come back, but I think you are going to have to come back Thursday. Our best judgment to begin with in the case was Friday night, so actually [427] that's not too bad guessing as these things go. That's the best I can do. Any other questions? All right.

At this time I will excuse you, ladies and gentlemen, and I can't start until 9:30 tomorrow morning morning because I have an emergency hearing before that involving child support, so please be here in the juryroom at 9:30 in the morning. You may go.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury.)

The Court: Gentlemen, I don't guess there's anything else now. We'll recess.

Mr. D'Aiuto: 9:30?

The Court: 9:30 tomorrow morning. I can't start any sooner. We will recess Court then until 9:30 tomorrow morning, Mr. Clerk.

(Thereupon, at 5:05 o'clock p.m., the Court was recessed until 9:30 o'clock a.m. the following morning.)

[428] BE IT REMEMBERED the following proceedings were had and testimony adduced before the HONORABLE CULVER SMITH, one of the Judges of the above-styled Court, and a jury, duly empanelled and sworn, in the County Courthouse, in the City of West Palm Beach, County of Palm Beach, State of Florida, beginning at the

hour of 9:30 o'clock a.m., on Wednesday, July 15, 1970, with appearances as above-noted, to-wit:

The Court: Gentlemen, ready to proceed?

Mr. Montgomery: Yes.

Mr. Frates: I have a couple newspaper articles I would like to put in the record and have marked, specifically to the Miami Herald, Wednesday, July the 15th, 1970, Palm Beach News, which there's an article and I assume I'm accepting what it says is what transpired, it quotes counsel for Mrs. Firestone, goes into some discussion they had with Judge Knott in the hall about the effect of the divorce. I don't know if Your Honor has read it. Instead of saying it, I wonder if Your Honor would mind reading it.

The Court: What is it you wish to do, Mr. Frates?

[429] Mr. Frates: I think, Your Honor, it's, obviously we don't want a mistrial at this stage, after all of the expense and time involved so we are not moving for a mistrial, but it's again part of the record, we urge Your Honor, after you read that article, you can see the context.

The Court: You want it identified?

Mr. Frates: Identified and then come back and argue because I think we need a specific instruction to the jury stronger than just a normal one.

Mr. Montgomery: I don't have to urge charging the jury on the newspaper, I would hope that you would.

The Court: At this time let's just identify it.

Mr. Frates: I want to take more time, but I think the fact that counsel himself participated throws a somewhat different light on it.

The Court: The whole question would be whether the jury is following my instructions or not. Mr. Clerk, would you just mark this for identification?

The Clerk: Defendant H for identification.

[430] (Thereupon, the document referred to was marked Defendant's Exhibit H for identification only.)

Mr. Frates: Now, Your Honor, also, Palm Beach Times, Tuesday afternoon, July the 14th, and the West Palm Beach, Palm Beach Times Stock Final, and both of these where it quotes counsel for the plaintiff as saying that Mrs. Firestone wasn't present during the trial because it was such a traumatic experience to her. Again, apparently, Your Honor, trying one case before Your Honor in the Courthouse and one out in the halls and the newspaper.

The Court: What the jury hears, that's the important thing.

Mr. Frates: Yes, I think the problem is, as Your Honor knows, you instructed the jury, and I have no doubt that the jury is going to follow instructions. It's so difficult not to have somebody read these things or comment on them. I don't imply any violation of your instructions.

The Court: All I can do at this time is ask them [431] to be marked for identification.

Mr. Frates: That's all I have.

The Court: All right.

The Clerk: Defendant I and J for identification.

(Thereupon, the documents referred to were marked Defendant's Exhibits I and J for identification only.)

The Court: Call the jury, please.

(Thereupon, the jury returned to the Courtroom after the overnight recess and the following proceedings were had in their presence and hearing, to-wit:)

Mr. Montgomery: May it please the Court, Mr. Bailiff, would you ask Judge Knott to come, please.

Mr. Frates: Counsel, save a little time here.

(Whereupon, proceedings were had out of the hearing of the Court Reporter and jury.)

The Bailiff: Judge Knott is in a hearing right now.

Mr. Montgomery: Did he tell you how long it will [432] be?

The Bailiff: No, he didn't.

Mr. Montgomery: Your Honor, that will be my next witness and I don't want to proceed until Judge Knott takes the stand.

The Court: Can't proceed without him?

Mr. Montgomery: No, sir, I want to have him as my next witness, so if we could take a recess until he's through I would appreciate it.

The Court: He may be there all morning, I don't know.

Mr. Montgomery: May I ask him how long it's going to be?

The Court: You don't have an objection if I send him a note asking him?

Mr. Montgomery: Your Honor, his testimony so far as I am concerned will not take more than five minutes.

The Court: We do have one point to decide. Perhaps if we could do that before I send a note in to him.

Mr. Montgomery: You mean upon Judge Knott's testimony?

The Court: Yes.

[433] Mr. Montgomery: All right, sir.

The Court: Don't you think we could do that? I can meanwhile send a note in. I will send a note in to him first.

Mr. Montgomery: Your Honor, this was served this morning and we would like to put that in the Court file. That's a subpoena for Judge Knott.

Your Honor, I probably at this time, while we are waiting here, the retraction letters, demands, at this time.

Mr. Frates: Your Honor, we don't feel they are relevant, we have no objection.

The Court: All right. You offer that. All right. they will be admitted.

The Clerk: Plaintiff A and B for identification now in evidence as Plaintiff's 11 and 12 without objection.

(Thereupon, the documents previously marked Plaintiff's Exhibits "A" and "B" for identification were received in evidence as Plaintiff's Exhibits No. 11 and No. 12 and made a part of the record.)

[434] Mr. Montgomery: While we are waiting here could I allow the jury to just see them?

The Court: Yes, as soon as they are in evidence.

Mr. Montgomery: Likewise, at this time, Your Honor, we would like to put in the financial statement of Time magazine.

Mr. Frates: Your Honor, we object to that. I think we previously discussed that and maybe we can take that up while we are waiting for Judge Knott. We object to it.

The Court: I think what I will do is take that up after hearing arguments and so forth, and if your argument prevails, then it will be given to the jury. If not, it won't be shown.

Mr. Montgomery: Your Honor, may I explain to the jury these letters say the same thing so I could start one at one end and the other at the other end?

The Court: They are identical in wording?

Mr. Montgomery: Yes.

Mr. Frates: Perfectly all right.

The Court: One other thing, ladies and gentlemen, hoping the noise will stop, we are all working under handicaps. We will [435] all have to do the best we can.

Mr. Montgomery: I said they are the same in context, except for the date.

The Court: Except for the date. Gentlemen, come forward a moment.

(Whereupon, proceedings were had out of the hearing of the Court Reporter and jury.)

Mr. Montgomery: You want me to proffer his testimony?

The Court: Why don't we do that.

Mr. Frates: Sure, if he's coming in, that's fine. Oh, that, yes.

Mr. Montgomery: Sure, I am going to proffer his testimony.

The Court: Ladies and gentlemen. I am sorry, we will have to ask you to go to the juryroom for a few minutes now. Appreciate your patience.

(Whereupon, the following proceedings were had out of the presence and the hearing of the jury.)

Mr. Frates: Your Honor, the only objection I have, he obviously has the right to proffer, [436] but I want him to proffer by Judge Knott.

Mr. Montgomery: Absolutely.

The Court: We will call Judge Knott. He says he's available at any time.

The Bailiff: Yes.

The Court: So ask him if it's convenient now we would like to have him come in, if it's convenient.

One more thing, Mr. Frates, I think the simplest way is just to preserve your objection, let him go ahead and proffer and I think there's two subjects he's going to cover.

Mr. Montgomery: That's right.

The Court: I don't know whether there's going to be any objection to the admissibility of the second portion. Yours is the interpretation.

Mr. Frates: He obviously has a right to proffer whatever he wants, unless it gets so far afield, and then I assume Your Honor would stop him. I agree, if we can raise the objections after.

Mr. Montgomery: Your Honor, in order to save time, the only thing that will be deleted [437] is as to who Judge Knott is and how long he's been on the bench.

WHEREUPON, JAMES R. KNOTT, called as a witness for and in behalf of the plaintiff, after being by the Clerk of

the Court first duly sworn, in answer to questions propounded, testified as follows, to wit:

The Court: Judge, we are first going to give your testimony by a proffer because then we'll have some, possibly some arguments as to admissibility and we are skipping for identification and everything.

Mr. Frates: Can we also stipulate in the record that this matter, Firestone versus Firestone, is pending in the Fourth District Court of Appeals?

Mr. Montgomery: I don't know anything about that. That's what I hear.

Mr. Frates: While we are not involved in it, I represent to the Court that it is pending there, presently pending, been no decision.

The Court: All right. Go ahead.

[438] *Direct Examination by Mr. Montgomery*:

Q. Good morning, Judge Knott.

A. Good morning.

Q. Would you state your name, please, sir?

A. James R. Knott.

Q. Judge Knott, on or about December the 16th of 1967 did you have a conversation with one Robert Delaney who represented himself as being with Time magazine?

A. I suppose it was about that date, I did have a conversation with Mr. Delaney.

Q. Do you recall the time of that particular conversation?

A. No, I don't.

Q. Judge Knott, did you ever tell Robert Delaney or any of the agents, servants, employees, correspondents or reporters of Time, Incorporated, for Time magazine that you found Mary Alice Firestone guilty of adultery?

A. No.

Q. Judge Knott, did you in fact, as presiding Judge over the Firestone versus Firestone proceedings, find Mary Alice Firestone guilty of adultery?

A. No.

Mr. Montgomery: No further questions.

The Court: Mr. Frates?

[439] Mr. Frates: Well, your Honor, of course I would want to cross examine him, I don't know whether Your Honor wants me to do that.

The Court: I think first see if there is any objection you have to this testimony.

Mr. Frates: Yes, sir, our objection is that this is a lawful order of this Court, including Judge Knott, the Circuit Court of this circuit, and that it speaks for itself and that just as you have prohibited both sides from interpreting or their witnesses interpreting, in spite of his lofty position, I don't think that Judge Knott can testify or is competent to interpret that document. It speaks for itself, it's an order of this Court.

The Court: I think your objection to this proffer is only as to the second question concerning his interpretation. How about the conversation?

Mr. Frates: There is no dispute, there was no contention that he told them one way or the other on there, that's the testimony in this case.

The Court: I am talking about a conversation.

[440] Mr. Frates: Yes, sir, that's what I am talking about.

The Court: He just asked him if he told him that and he told him no.

Mr. Frates: He answers in the negative, he can relate a conversation.

The Court: I think that portion is admissible because it's just further testimony, I believe Delaney testified about that, and he is just further——

Mr. Frates: I would object to the form in which it is asked if it's asked in the same form, Your Honor, because it's a negative thing, they didn't discuss it, according to Delaney, according to what he said they didn't discuss the grounds.

The Court: Wouldn't that be subject to cross examination?

Mr. Frates: Yes.

The Court: I think that portion is proper. The only portion that I would consider an objection to is about what he actually did.

Mr. Montgomery: Your Honor, in order to allow the jury to interpret the order of His Honor Judge Knott here in this particular [441] case, it's not an interpretation of the order in the first place. It's just a question of whether he found Mary Alice Sullivan Firestone guilty of adultery in that order.

Now, to allow the jury to speculate on that, who is better qualified than the Judge who rendered the order himself, Judge Knott in this particular case, to allow the jury to wonder what Judge Knott did would be to put them on the level of an appellate court. This is a question of law. This is not a question of fact, if the Court please.

There is in that document cases cited and it takes a lawyer to interpret that. This is a question of law and not fact, we are not asking Judge Knott to interpret his order. We are asking him the simple question did he grant the divorce on the grounds of adultery. That's all we are asking him, so far as Mrs. Firestone is concerned. Now, that's all I have,

Your Honor. It's just a matter of law, it's a question of law and to allow the jury to reach some other decision on this particular point would, [442] would just be wrong. It would just be putting them in a position of an appellate court.

It's not a question of fact of what a common man could say, or whatever the Time, Incorporated, is arguing because these people, Time, Incorporated, never even saw that order, if the Court please, never saw that. That's all I have, sir.

Mr. Frates: Well, Your Honor. I think, and I agree with counsel they should not speculate. With some reservations I would say that probably is a matter of law but a matter of law for you, not the witness. This is a document, it's just, I think you put it on the same basis as a contract. It speaks for itself and I think it's a matter of law, not Judge Knott's interpretation of what he meant, or what he thought he meant or whether he would agree with one side or the other, but it speaks for itself and then I agree, but it's not for the witness and all he is is a witness in this case. He's not the Judge, Your Honor is the trial judge.

Mr. Montgomery: May I be heard one more time, [443] Your Honor? We have introduced the interrogatories signed by their then president, Number 8, pertaining to where they got the information, question, interrogatory Number 8a: "What was your source of the information appearing in the Milestones of said publication relating to Mrs. Mary Alice Firestone?" Answer, 8a: "Associated Press dispatch, Miami Herald, Joseph D. Farish, Jr., James R. Knott."

The Court: Is that all you have, gentlemen? I am ready to rule on it. I am going to sustain the

objection to that portion. I overrule the objection as far as conversation or what he told Mr. Delaney. That you can put in. The other, I feel that for one thing, it's my personal feeling that it's probably under the general rules not admissible, his interpretation, second, but the Court has to rule on orders and judgments, and if they are to be explained or clarified there should be some motions by parties in that case to ask the Court on the record to clarify it. I don't think they should be called in other matters to [444] interpret their—everyone understand?

Mr. Montgomery: Yes, sir, I will ask him just the question, just whether or not he ever, to any of the employees, correspondents, of Time magazine or Robert Delaney or anyone else associated with them, ever told them that he had found in his order —no, I can't say that. Did he ever tell them—well, you see now, I'm worried about my question now.

The Court: Young lady, can you go back to the question?

Mr. Frates: May I suggest this, did he ever have a conversation about the grounds of divorce with these people.

The Court: As a preliminary, and did he tell them that he found her guilty of adultery.

Mr. Montgomery: All right.

Mr. Frates: Your Honor, the only problem, I don't want him to ask a question, although he can ask his own question, where he leaves the impression that Your Honor has just ruled against.

The Court: It has to be confined, did you tell him that, not did you find.

[445] Mr. Montgomery: Did you tell him you found Mary Alice Firestone guilty of adultery.

The Court: Did you tell him that. What's wrong with that, Mr. Frates?

Mr. Frates: All right.

The Court: As long as he confines it to the fact, did he tell them he found them guilty. Well, call the jury.

Mr. Frates: Your Honor, since he has asked Judge Knott, may I have the right to ask him a few question on this?

The Court: You can cross——

Mr. Frates: Before the jury comes in.

The Court: All right. Go ahead.

Cross Examination by Mr. Frates:

Q. Judge, one simple question, always preface that, means it's not simple. Did you discuss the grounds with Mr. Delaney or any of these people, and we are specifically referring to Delaney's conversation?

A. I don't really recall whether I did or not.

Mr. Frates: Thank you, sir.

Redirect Examination by Mr. Montgomery:

Q. Your Honor, on this divorce you rendered the decree [446] on Friday, December the 15th, 1967, as is reflected in the record. Did you have a copy of that decree at home with you?

A. No, sir, I don't think I had it at home, wouldn't have any reason to.

The Court: All right. Call the jury, please.

(Whereupon, the jury returned to the Courtroom and the following proceedings were had in their presence and hearing.)

Mr. Montgomery: May it please the Court.
The Court: Yes, sir.

Thereupon, JAMES R. KNOTT, called as a witness for and in behalf of the plaintiff, after being by the Clerk of the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

Direct Examination by Mr. Montgomery:

Q. Would you state your name, please?
A. James R. Knott.
Q. Would you tell me your profession, sir?
A. I'm a Circuit Court Judge of the Fifteenth Judicial [447] Circuit of Florida.
Q. And Judge Knott, how long have you been a Judge here in this county, in our Court?
A. Since July 1, 1956.
Q. And I believe you are the senior Judge in this county at this time; is that correct, sir?
A. Yes, sir.
Q. Judge Knott, did you preside over the proceedings, divorce proceedings of Firestone versus Firestone, sir?
A. Yes, sir.
Q. And did you enter an order and final judgment on that particular divorce suit?
A. Yes, sir.
Q. Your Honor, I would like to ask you, please, whether or not on or about December the 16th, which was a Saturday, of 1967, did you have a conversation with a person that identified himself as Robert Delaney with Time magazine?
A. Yes, sir, I can't be certain of the time but I did have a conversation with Mr. Delaney.
Q. Your Honor, to your best recollection did you have a copy of your final judgment with you at home when you had this conversation with Mr. Delaney?

A. No, sir.
Q. Your Honor, did you ever tell Robert Delaney or any [448] agent, employee, correspondent, reporter or anyone else associated with Time magazine or any other news media that you found Mary Alice Firestone guilty of adultery?
A. No.

Mr. Montgomery: Your witness.

Cross Examination by Mr. Frates:

Q. Judge, he of course is asking did you tell anybody that and your answer is no: is that correct, sir?
A. Yes.
Q. Judge, did you discuss the grounds of the divorce with Mr. Delaney in your telephone conversation?
A. I don't recall that I did.

Mr. Frates: Thank you, Your Honor.
Mr. Montgomery: That's all, Your Honor.
The Court: Thank you very much.
Mr. Montgomery: Thank you, Your Honor.

(Witness excused.)

Mr. Montgomery: Call Mary Alice Firestone.

Thereupon, MARY ALICE FIRESTONE, called as a witness for and in behalf of the plaintiff, after being by the Clerk of the Court first duly sworn, in answer to questions propounded, testified as follows, to-wit:

[449] *Direct Examination by Mr. Montgomery:*

Q. Would you state your name, please?
A. Mary Alice Firestone.
Q. And where do you live, Mrs. Firestone?

A. 236 Pendleton, Palm Beach.

Q. And how long have you lived in Palm Beach County?

A. Since I was in the ninth grade.

Q. Were you married to Russell Firestone?

A. Yes.

Q. And were you divorced from him?

A. Yes.

Q. And may I ask, Mrs. Firestone, who lives with you presently at your home?

A. My son, Mark Firestone.

Q. How old is he?

A. Seven.

Q. Anyone else?

A. My brother, Charles Turner.

Q. And Mrs. Firestone, let me ask you, please, ma'am, you completed your education here in Palm Beach County through the high schools here?

A. Yes.

Q. Did you go on to college?

A. Yes.

[450] Q. Did you receive a degree?

A. I did.

Q. And after you received your degree did you work here in Palm Beach County?

A. I taught school for two years.

Q. What grade?

A. Fifth.

The Court: Mr. Montgomery, excuse me. If at any time the jury does not hear now, because of this noise, let us know. Mr. Frates, if you would like to——

Mr. Frates: I can hear fine.

The Court: If you can't, you can pull a chair up here.

Mr. Frates: Thank you, sir, I can hear fine.

By Mr. Montgomery:

Q. What school was that, Mrs. Firestone?

A. Greenacres.

Q. All right. And Mrs. Firestone, would you tell us, please, ma'am, when this article in Time magazine of December the 22nd of 1967 was first brought to your attention?

A. Well, about that time I received a phone call and I really don't remember who it was, I believe it was a woman, called and said——

[451] Mr. Frates: Your Honor, we object.

Mr. Montgomery: All right.

The Court: Objection sustained. Repeat your question. She's not directly responding to it.

Mr. Montgomery: Yes, sir.

By Mr. Montgomery:

Q. Let me ask you this. Did you receive your first—how did you receive your first notice of this particular article?

A. A telephone call.

Q. Now, was the article over the telephone read to you?

A. Yes.

Q. And what did you do after that article was read to you over the telephone, Mrs. Firestone?

A. Well, I said it wasn't true and I went to the drugstore to purchase the magazine.

Q. Did you buy it there and read the article?

A. Well, I was so upset I didn't allow myself to read it in the drugstore. I went to the car and read it.

Q. And did it say what the telephone conversation related?

A. Yes.

Q. And then what did you do, Mrs. Firestone?

A. I went home.

Q. What did you do when you went home?

[452] A. Told my brother about it.

Q. Did you have any discussion with him about it, without saying what it was?

A. Yes.

Q. Then after you had this discussion with your brother what did you do next?

A. I called my attorney, Joe Farish, Jr.

Q. All right. Did you have a conversation with him?

A. Yes.

Q. What did you tell him?

Mr. Frates: I object to what she told him, Your Honor.

Mr. Montgomery: It would be a conversation that she knows, that she has a first party——

The Court: Not what he told her.

Mr. Montgomery: Yes, what she said, not what he said.

Mr. Frates: It's a self-serving declaration, Your Honor.

The Court: But it's subject to cross examination. Not what he said, just what she told him. This is what she said. Objection overruled.

Mr. Frates: All right, sir.

Mr. Montgomery: Your Honor, I would like to get in, so we can take up this right at the [453] present time, I would like to ask the Court that I intend to ask her a question as to what Mr. Farish told her back, not for anything, although there is a, would be hearsay, but it is an exception of the hearsay rule going to state of mind at this particular time and if Your Honor would rule now I can save some time.

Mr. Frates: Your Honor, Mr. Farish was here on the stand, testified, and if my recollection is correct he didn't ask any questions.

The Court: I don't quite get what you want to do, Mr. Montgomery. Perhaps you'd better wait till the time arises.

By Mr. Montgomery:

Q. Mrs. Firestone, let me just ask what you told Mr. Farish over the telephone.

A. I asked him if he had read Time.

Q. All right.

A. And——

Q. Don't tell us what he said.

A. I said, "Joe, what am I going to do? It's not true, the Judge did not find me guilty of adultery. What can I do about it?"

Q. All right. Did you have any other conversation with [454] him other than those matters?

A. Not that I remember, I was too, I just couldn't handle my emotions at that time.

Q. All right, now, let me ask you, Mrs. Firestone, has this article, do you still continue to think about this article and does it still bother you?

Mr. Frates: I—go ahead.

By Mr. Montgomery:

Q. Does this article bother you, did it bother you?

A. It has ever since it came out, there isn't a day that goes by that I don't think about it.

Q. What about the article concerns you most, Mrs. Firestone?

A. That my son will one day hear about it and understand what it means.

Mr. Montgomery: Your witness.

Cross Examination by Mr. Frates:

Q. Mrs. Firestone, I am sure you understand that I will ask you just a few questions. Mrs. Firestone, you say your attorney, Mr. Farish, he handled this case for you until just a short time ago, is that correct, this case we are in now?

A. Yes.

Q. Mrs. Firestone, you brought a suit for separate [455] maintenance, is that correct, through your attorneys——

Mr. Montgomery: I did not bring this out on direct.

Mr. Frates: He's talking about what she thinks each time, I think there are many other factors, I am just going to hit it briefly.

The Court: All right.

By Mr. Frates:

Q. You brought a suit for separate maintenance?

The Court: She said yes, I believe.

The Witness: Yes.

By Mr. Frates:

Q. And your husband sued for divorce?

A. Yes.

Q. And he was granted the divorce which you resisted; is that correct?

A. Yes.

Q. Mrs. Firestone, did that, in and of itself upset you, too?

A. Yes.

Q. Mrs. Firestone, do you take a clipping service or back then did you have a clipping service?

A. No.

Q. Well then, if the final judgment said that you had a clipping service that would be incorrect?

[456] A. Perhaps my husband did, I didn't.

Q. All right. Well then, again, would the answer, if you say you didn't have a clipping service and the final judgment said you did that would be incorrect, the final judgment?

A. Yes.

Q. Have you ever had a clipping service of any type?

A. No.

Q. Mrs. Firestone, I don't want to ask any details but back in December of 1967 were you under medical care?

A. Yes.

Q. And can you tell the jury who the doctor was, let's say, the early part of December and prior to that, the doctor's name?

A. Doctor Cooney.

Q. Doctor Cooney.

A. Doctor Sory.

Q. Mrs. Firestone, we don't have to know the names. Then there was more than one doctor that you were being treated for, or going to for medical reasons?

A. Yes.

Q. In December and prior to that time?

A. Yes.

Mr. Frates: I have no further questions.

The Court: Anything else?

[457] Mr. Montgomery: No further questions. Come down, Mrs. Firestone.

(Witness excused.)

Mr. Montgomery: We have completed our case with the exception of the financial statements.

The Court: All right. Let's let it sit right there. With the exception of the proffered exhibit on which I have not ruled, you rest; is that right?

Mr. Montgomery: Yes.

The Court: I have to rule on that one thing. Other than that he rests.

Mr. Frates: Yes, sir, and of course that's all right. Your Honor, other than a few documents, since counsel has called the witnesses we have here, we have motions and after we finish that there will be a few of these documents we have to put into evidence.

The Court: The only evidence you have at this time to submit would be documentary evidence?

Mr. Frates: Yes, sir, one of the newspaper articles which has been identified. I point that out to give you some idea of the time.

(Whereupon, proceedings were had out of the hearing of the [458] Court Reporter and jury.)

The Court: Ladies and gentlemen, at this time now we have a great many more things to do. We won't need you, though, until the lawyers are ready to argue the case. I believe this is right. We won't need the jury any more till, well, yes, we might, that's true, because depending on certain exhibits you would want them to see.

Mr. Montgomery: We can do that, wouldn't take us a minute. In other words, depending on your ruling, so far as I am concerned, it would be reading them then to the jury.

Mr. Frates: When they come back.

The Court: If I admit your exhibit, wouldn't take five minutes, would it?

Mr. Montgomery: Oh, no, not at all, a minute.

(Whereupon, proceedings were had out of the hearing of the Court Reporter and jury.)

The Court: So I hope, here's what I am going to do, and this is my decision when I think it's going to, may seem to you like it's taking up a lot of your time, but at the same time releasing you from some time in [459] the juryroom, also, just sitting there, and you are not doing anything in there, and as you know from my instructions you can't discuss a case while you are in there when we are not through.

So ladies and gentlemen, I am going to release you until 9:30 tomorrow morning. Now, at that time the lawyers will argue the case and I will charge you and the case will go to you for your decision and you will be through sometime Thursday, depending on how long it takes you to decide the case.

So you know that Friday at least is free, and you are free for the rest of the day which I hope you can make use of, but at least it's worked out so that, many cases the jury will sit back there for maybe two hours while we figure these things. I think it will take longer in this case so I hope you can use the time, so anyway, it's my decision, not the lawyers to do this.

So I'll excuse you until 9:30 tomorrow morning. Now, ladies and gentlemen, of course you about news articles or news broadcasts and I know that you have obeyed [460] them implicitly. I might

say there have been a great number of news articles concerning this case. I don't know whether there has been anything on television or radio because I haven't listened for it myself, but I suppose probably in the news reports there have been and there's nothing wrong with this being reported, this is a proper matter for it to be reported in newspapers and for any trial that the news media may think of interest to the people they have a perfect right to report it and that's all right.

But for the jury itself, you just can not read those things because we are all human and sometimes some things influence our thinking and we want the individual thinking of each of you. This is very important. So again I wish to admonish you very strongly not to read any news articles, not to listen to any reports on television or radio.

If your friends save these articles for you, or if you want to read them after your verdict is in you have a perfect right to do [461] so. But we must have your independent thinking without considering other people's opinion or how things impress them.

I think all of you understand that very clearly, all of you. Fine, we appreciate it, and the lawyers and myself have confidence that you will follow this instruction and with that I'll release you till 9:30 tomorrow morning. Please be in the juryroom at that time.

(Whereupon, the following proceedings were had out of the presence and the hearing of the jury.)

The Court: Would counsel come to the bench? We are at ease right now. Suppose we come back at 2:00. Since we are having motions, they should

be made in open court. We will come back at 2:00 o'clock and open court at that time. We will recess until 2:00 o'clock, Mr. Bailiff.

(Whereupon, at 10:20 o'clock a.m., the Court was recessed until 2:00 o'clock p.m. that afternoon.)

[462] Certificate.

* * *

[464] BE IT REMEMBERED the following proceedings were had and testimony adduced before the HONORABLE CULVER SMITH, one of the Judges of the above-styled Court, and a jury, duly empanelled and sworn, in the County Courthouse, in the City of West Palm Beach, County of Palm Beach, State of Florida, beginning at the hour of 2:00 o'clock p.m., on Wednesday, July 15, 1970, with appearances as above-noted, to-wit:

AFTERNOON SESSION

(Whereupon, the following proceedings were had out of the presence and the hearing of the jury.)

The Court: Gentlemen, let me announce the way I want to proceed here this afternoon and hope it will be satisfactory with you gentlemen. I think it will. If it's not, don't hesitate to tell me. What I would want to do——

Mr. Montgomery: May I be seated while you are talking to us?

The Court: Sure, absolutely. First, I'll have you make a, each side make a formal proffer [465] into evidence, he has something and you have something, at which time the

other party merely state they object. I'll just have it marked for identification and reserve ruling until I hear the arguments which all tie in together.

Then second, the parties will make their motions, Mr. Frates has a motion or two to make, I don't know whether you have or not, but anyway, make your motions and then I will hear the arguments on the motions. I think at that time, gentlemen, probably I'll recess for a few minutes, then we'll go over the requested charges.

Now, I realize that in the event I grant Mr. Frates' motion that will be a waste of time, but I would like to do all this, if you don't mind, and we'll go over all of that, and then let's see, the jury is coming back at 9:30. At 9:00 o'clock, if you'll, I mean I want to hear all arguments so they will all be finished today and everybody will have had their say of whatever they have had to say and then at 9:00 o'clock tomorrow morning I'll have [466] in my chambers there written out a memo to each of you exactly what I am going to do. Of course what I am going to do I will announce when we come in here at 9:30, I'll announce out of the presence of the jury, but you will know, if that gives you enough time. In other words, if I grant Mr. Frates' motion, that's all right. If I don't, that will give you enough time to know what instructions I will give or not give so you'll know that when you make your arguments. Now, this is a little unusual procedure but is it all right with you, gentlemen?

Mr. Frates: Yes, sir.

Mr. Montgomery: Yes.

The Court: Disagreeable with anyone?

Mr. Frates: No.

The Court: As I say, there will be no arguments tomorrow, we will hear them today, you argue as much as you wish, in an orderly fashion. First thing would be to offer the, the plaintiff to offer that document into evidence.

Mr. Montgomery: Yes, sir. At this time, the plaintiff, Your Honor, this is in accordance [467] with the letter.

Mr. Frates: Yes, no question, we contend if it is admissible, only the net worth, not the whole financial report.

Mr. Montgomery: Absolutely.

Mr. Frates: I think you mentioned 5, it's 200 and something over there, that's the assets before the liabilities.

The Court: Let him offer it and then you make an objection to it.

Mr. Montgomery: We would like to show that the advertising—excuse me just a second.

The Court: You just want to offer something from this?

Mr. Montgomery: Yes, sir.

Mr. Frates: 27 I think is the net worth.

Mr. Montgomery: Yes, the total net worth of the company as found on page 28, as of December 31, 1969, would be $545,429,000.

Mr. Frates: Excuse me, I think you are reading——

The Court: Suppose you get together.

Mr. Frates: We can change the amount later, let's go ahead and not—net worth is what you are after.

Mr. Montgomery: You are saying you are worth [468] only two hundred twenty-nine million, a hundred and two hundred thousand dollars, that's retained income.

Mr. Medina: No, stockholders equities. See, this page 26 has all the assets.

The Court: That ought to cover you pretty good.

Mr. Montgomery: Your Honor, the total assets of this consolidated balance sheet as given to us in answer to interrogatories is five hundred forty-five million some odd dollars.

The Court: But for your purpose is it the law it's the net worth?

Mr. Montgomery: Yes, sir, that is the net worth of the company, total assets of the company.

The Court: Well, you have liabilities against assets.

Mr. Montgomery: Yes, sir, we do, but so far as the——

The Court: I'll tell you, and if I decide you are entitled to evidence of that nature I will decide what the figure is, how's that?

Mr. Montgomery: Mr. Medina wants to limit us to two hundred twenty-nine million, a hundred and two thousand dollars here, so I guess you'd better——

[469] The Court: Well, you offer which ever one you want.

Mr. D'Aiuto: Offer them both, which ever one is the net worth figure.

Mr. Montgomery: All right. We offer them both, then, if the Court please.

Mr. Frates: To which the defendant objects on the ground there is no issue of punitive damages in this cause and therefore the submission.

The Court: All right. Do you want this marked for identification or do you just want to read that in, don't you?

Mr. Montgomery: Read that in. There is one other thing, Your Honor, pertaining to the net——

The Court: I think reading it in, if it's admissible, would be the proper way rather than the whole book.

Mr. Montgomery: Absolutely.

The Court: Inasmuch as it's not material.

Mr. Montgomery: The net income, I wanted to show that the net income for the year ended December 31, 1969, for this corporation was $23,916,000, also.

[470] Mr. Frates: That's not admissible.

The Court: You object to it at this time?

Mr. Frates: Yes, object to it.

The Court: The Court will reserve the ruling until we have heard the arguments on the subject.

Mr. Montgomery: I guess we'd better mark this for identification.

The Court: All right. Mark it Plaintiff's for identification.

The Clerk: This will be marked Plaintiff's Exhibit D for identification only.

Mr. Montgomery: May I have that back when you get through with it?

The Clerk: I will mark it on the front page.

(Thereupon, the document referred to was marked Plaintiff's Exhibit D for identification only.)

The Court: Do you have any other exhibits, Mr. Montgomery?

Mr. Montgomery: No, Your Honor, that would be the only exhibit we have.

The Court: It's my understanding then, subject to the Court's ruling on the admissibility [471] of that evidence, which you have just proffered, the plaintiff rests?

Mr. Montgomery: That's correct, sir.

The Court: All right, Mr. Frates. Have you rested? He rests subject to my ruling.

Mr. Frates: Yes, of course. Now, Your Honor, at the close of the plaintiff's case the defendant wishes to make a motion for a directed verdict and we have this one typed out and if it meets with Your Honor's approval I would like to file this and then put our document in and close it and we will rest and then renew our motion and argue at that time, if that's all right.

The Court: That's fine.

Mr. Frates: All right, sir. Your Honor, at this time the defendant, Time, Inc., offers into evidence the Defendant's Exhibit B for identification which has been identified

as the New York Daily News which has been referred to by numerous witnesses and has been identified.

Mr. Montgomery: To which we would respectfully object on the following grounds. Number one, this was not noted in the pre-trial [472] conference, so far as an exhibit is concerned, to my knowledge. Number two, there's been no proper authentication of that particular article, there has been no proper predicate of foundation of that particular article.

And number three, based upon the answers to interrogatories given by Time, Incorporated, that they specifically set forth the items upon which they relied which was the Miami Herald article, the AP dispatch, the dispatches from the Miami Bureau, Judge Knott and Mr. Farish, and that's all. So if the Court please, it's just been, I don't know that it's authentic, I don't know that it's true, no proof upon it, it's not listed as a pre-trial exhibit and we respectfully object to it.

Mr. Frates: Your Honor, it was attached, in answer to it it was attached to the affidavit of Nadasdy, Doerner and Daniels. All three of them testified. And if Your Honor will recall, I showed Mrs. Nadasdy the copy of this which was attached to her affidavit, there were two documents attached [473] to the three affidavits. All of the witnesses, those three, testified that this was a source material, it was available on the fifteenth. They have all testified and identified this as that particular portion.

Of course it's true they mentioned the Miami Herald, but this was attached to the Linen affidavit and it was called Miami Herald, but it's not the Miami Herald but this is the picture that was involved. Now, this was a matter of the Court file. I want to check as to whether it was listed. It was in the Court file itself.

Mr. Stewart: At the time of the pre-trial, and Your Honor may recall this, we had the files up there and we

were talking about the exhibits that we were going to have and Mr. Farish, as we were going down, he said you mean you are listing all these things that are attached to these affidavits and he flipped through them, and we said yes, and they were right there. He had it in his file and it's in the Court file and everybody else's file, so it was talked about.

The Court: I have an opinion on this. Go ahead [474] and argue, though.

Mr. Frates: No, sir.

The Court: All right. You want to respond to that?

Mr. Montgomery: Furthermore, it would be absolutely irrelevant to this cause again because of the testimony of Mr. Doerner that they never rely on matters other than from their bureau people in Miami, and secondly, that it would be completely and absolutely irrelevant to this particular libel because for this reason, republication of a libel, regardless of its source, makes the person nevertheless liable for libel.

Mr. Frates: The facts he stated, I disagree.

The Court: It's my opinion it should be admitted in this case. I think first you weren't at the pre-trial and I think that portion of it, it was covered as far as it being noticed and so forth at the pre-trial because this is what took place. You were not present, Mr. Montgomery.

Mr. Montgomery: No, sir, I was not. I can't contradict.

The Court: But what Mr. Stewart said is [475] substantially as I recall what took place, we did go through those affidavits.

Mr. Montgomery: Wasn't the objection, were there any——

The Court: Objection was reserved.

Mr. Montgomery: There has been no proper predicate of foundation as to the authenticity as to this article, if the Court please.

The Court: Here's the way I remember. I am going to admit it in evidence. The reason is, of course, there isn't any evidence that it's true, of course, there is no evidence that the Miami Herald's statement was true or anything else, that isn't the point.

But you call witnesses and have questions whether they had this before them. That doesn't mean they had any right to read it, look at it or anything else, but this was one of the things, like the AP dispatch, whether they had it before them, I don't know whether the AP dispatch is true, as far as that goes, I don't know.

This is in dispute. The witnesses [476] called by you, some of them, one of them at least, said that this was one of the things they had before them and they said they don't rely on that but it was one of the things they had before them. They don't rely on it alone.

Mr. Frates: That was the difference.

The Court: I feel it should go in for whatever it's worth. I will overrule the objection. It will be admitted as defendant's next numbered exhibit.

The Clerk: This will be admitted as Defendant's Exhibit Number 3 over objection.

(Thereupon, the document referred to was received in evidence as Defendant's Exhibit Number 3 over objection.)

The Court: Is that all the exhibits you have?

Mr. Frates: Your Honor, with the introduction of that and based on the proposition that the three Time employees and Delaney were called that we had present for the trial, researcher, writer, the editor, and the stringer, were called and subpoenaed and [477] presented their testimnoy, were called on behalf of the plaintiff, that the defendant, Time, has no witnesses, they have previously been called, and the defendant rests.

The Court: All right.

Mr. Montgomery: We have a motion for a directed verdict.

The Court: Yes. Now, his motion would come next. You have made yours at the close of his evidence. It doesn't matter.

Mr. Frates: Your Honor, I don't know whether—it really doesn't make any difference. I assume Your Honor is going to hear us out and ——

Mr. Montgomery: Why don't you let the defendant go ahead and make his motion and then I will make mine.

The Court: I would like to hear both of you first because the argument will tie in both ways. Mr. Frates, I assume you wish to renew your motion you have already made for a directed verdict.

Mr. Frates: Yes, Your Honor. Your Honor, again from the technical phase of it I would just like to renew those portions of the motion [478] for directed verdict previously made and instead of reading them, Your Honor, I think to go back at the time of the argument and if I can discuss with them it might be more helpful to you.

The Court: Fine. Now, Mr. Montgomery, will you make your motion?

Mr. Montgomery: Yes, sir. Comes now the plaintiff and moves this Honorable Court to find that as a matter of law that the publication in the December 22, 1967, Life magazine, upon which this case is based by our complaint, the answer thereto and the testimony of the witnesses, that Mrs. Firestone is entitled to a verdict as a matter of law in her favor, both in compensatory and punitive damages, that the article itself shows that it is malice per se, that the damages are presumed in law to flow from malice per se, there need not be any proof of all of the elements of the damages flowing from there, the damages in this particular

case, mental anguish, humiliation and embarrassment, and we respectfully move that this Honorable Court grant a directed [479] verdict in favor of the plaintiff, Mrs. Firestone, both as to compensatory as well as punitive damages.

The Court: Now, Mr. Frates, I think we should argue your motion.

Mr. Frates: Yes, sir. Your Honor, may I point out in the statement of the damages Mr. Montgomery says mental pain and suffering, humiliation and embarrassment. Humiliation and embarrassment are not items, we don't think mental suffering is, but they have withdrawn damage to the reputation, so therefore you can't have embarrassment, it's a direct outgrowth from what other people feel about it, that's why you would be embarrassed, you wouldn't be embarrassed if no one knew at all anything about it there wouldn't be such a thing as publication of a libel. And humiliation is the same word.

So we might submit to Your Honor that we will argue that in our presentation here, that the damages of the mental pain and suffering or anguish of Mrs. Firestone really are not justified in this case. Mr. Stewart points out on page 5, this is a [480] transcript of Friday's hearing.

The Court: Excuse me for interrupting, these portions were ordered, the originals should be given to the Court.

Mr. Stewart: We ordered the original filed of that hearing.

Mr. Frates: Your Honor, on page 5 Mr. Montgomery states, when we think that we have the right to withdraw that particular element in this particular case, assuming talking about damage to reputation, go forward simply on the mental anguish, pain and anguish of Mrs. Firestone, so we don't feel those other elements, that they can't argue and claim the elements they have already withdrawn.

Your Honor, in trying to present our argument I want to, if I may, present, the outline, make some comments, ask

Mr. Medina, if it's acceptable, Your Honor, Mr. Stewart, if they have anything to add to that, try to be concise and short and not repeat.

Your Honor, directed to the counts 1, 2, 3 and our motion for a directed verdict and those other counts are what we call, for [481] the sake of this argument, constitutional counts or the Times-Sullivan counts. I don't want to rehash that. We have presented that to Your Honor in a memorandum, I would like to add certain things that have developed in this trial from the inception.

Mr. Montgomery, on interrogation of the jury said, to the effect, this is the Firestones, this is Russell Firestone, the Firestones. This has been presented throughout not only the interrogation but the various testimonies of the witnesses. Mr. Daniels of course was the managing agent but no contradiction that Firestone was a permanent person.

Mr. Montgomery: Excuse me, Mr. Frates, may I interrupt you just for a second? May I ask the Court one thing? I presume that you are arguing that she's a public figure and comes within the Times' case, because if so that's already been decided.

The Court: Let's let him argue.

Mr. Montgomery: All right, sir.

The Court: The best way we can get through with this, since it's just before me, is neither [482] one interrupt the other. If I don't consider it relevant, I will disregard it.

Mr. Frates: We have no intention of rehashing the whole argument. As Your Honor followed, on numerous occasions, the prominence of the Firestone name, both of who have the Firestone name, this is one of the reasons they were Milestones, those things developed through the trial. We say put a completely different light on whether or not she and Russell Firestone were public figures. We

say they were. But in addition to that, Your Honor, we feel that the constitution or the Times-Sullivan things apply not whether because she is a public figure but that a proceeding of this Court, or a Circuit Court of the State of Florida is such a matter of public interest, any proceedings of that Court, that no matter if it is Mr. and Mrs. John Smith, the public interest that the United States Supreme Court is talking about is comment, open free comment and debate on all matters of public interest and the fact that this proceeding came out of this Court we submit to Your [483] Honor, in and of itself, makes it a Times-Sullivan case.

Let me next go to the qualified privilege. We've submitted to Your Honor our memo on the qualified privilege and the cases therein. I don't want to read each one of these cases but I think that there is no question, at least in my mind, maybe Your Honor disagrees, that the report of a proceeding of a Circuit Court of this state comes within the qualified privilege doctrine, it's one of the classic phases of qualified privilege.

All right. Now, where does that make it different? Mr. Montgomery says that there is malice that is assumed from the publication of libel per se. That is true. But the exception to that is that if it is a matter of qualified privilege, then the cases hold that once, and it doesn't make any difference whether it's libel per se or per quod, if it comes out of a qualified privilege circumstance and that is established, and I submit, Your Honor, there's no dispute about that, that this was a report [484] of the proceedings of the Circuit Court, Judge Knott, Circuit Judge.

Then the burden shifts to the plaintiff, in this case Firestone, Mary Alice Firestone, to show the malice. I'm trying to pick out one of the several cases to read to Your Honor. In Shield versus Metropole Ice Company—you have our memo, Mr. Montgomery—136 Southern 554.

If the publication is qualifiedly privileged there is no presumption of malice from falsity and the plaintiff cannot recover without the proof by the plaintiff, by the plaintiff as mine, Your Honor, but the other cases, have actual as distinguished from merely legal malice, and this is what is applied when you are talking about malice per se. So on that basis, Your Honor, if we are right that this is a qualified privilege, and I submit I can't conceive of any question of that, then we're back into a position where the burden is on them. And every one of these Florida cases, Prosser, all of the authorities, enunciate this doctrine, that this is an exception and this [485] is why it is a qualified privilege.

All right. Now, in that context if we look at the evidence in this case there is absolutely, Your Honor, no evidence in this case direct or that could be inferred there was any malice. Now, I suppose we could always speculate but I submit to Your Honor that of the standard that these cases require, of that type of malice, there is absolutely not one word of evidence in this case.

I know Your Honor's mindful of the Fourth District opinion, and going back to that in the reading it, which we have done many times, and I think it would be fair to say that this in effect has said we reverse the summary judgment. I think that's taken in that context. They mention in the opinion the question of privilege.

We're not deciding whether this is a matter where it has to be actual malice as distinguished from applied malice or whether or not the publication was in any respect privileged. They said just, we are not going to talk about that. What we are saying [486] is that in this particular case we are going to reserve the summary judgment and we are going back and let the credibility of these witnesses be presented.

We now then come to what I think is an extremely important phase of how this testimony developed. Your Honor heard it and knows it as well as I do. But plaintiff called everyone of the witnesses and I'm not talking about being bound, I think that concept was erroneous and I think we have generally discarded it, not being bound by your witness. But we have never discarded the fact that when you call a witness to testify on behalf of a party that party vouches for that witness.

So we then take, and again, Your Honor, I think the difference is, I don't say they are bound, I don't say they are legally bound, and no matter what they said, that's it and there's no other thing. I think that's absurd.

But I say to the question of credibility which the appellate court was concerned about, the credibility of a [487] written affidavit, and I suppose there are a lot of us that try cases are always concerned about trying cases on affidavits. I think there is always a question in our mind and that runs throughout that opinion.

All right. Now, they have put these witnesses on, they have vouched for their credibility, they have stated the facts in this case. We contend that it's true but even if it is true there is not one word of malice or ill will, even if you assume there was mistakes and they didn't do this or Linen had the Miami Herald when he meant the news. All of these things.

As the cases clearly show negligence and things of that matter, they don't show malice. The Florida cases on qualified privilege specifically say the fact that it is false, Your Honor, doesn't of itself show malice. It could be a fact that because it was false. Now, we say it is not false. We say it is true, our people thought it was true, and this was their interpretation of it, buttressed by all the documents. But that really is immaterial.

[488] So we really have come to the posture in this case where they have put on the witnesses, we have to accept their credibility. They have testified and there is just, in my opinion, Your Honor, no basis on which this case could go to the jury.

Now, Harold, do you want to make any comment along this? Because I want to stop and not just, I find myself saying things the second time and then I realize.

Mr. Medina: I just have two points. One is that with the withdrawal of any claim for any damage to reputation I strongly urge Your Honor that there is no cause of action either at common law or under the constitution because a cause of action for libel by definition is a cause of action for injury to reputation and if there's no claim of injury to reputation, it just plain, constitutionally or under common law can't be a cause of action. That is one of the points made in the motion to dismiss or directed verdict but I just wanted to underline that point.

Secondly, I'll be very brief on it, I [489] do strongly urge Your Honor to reappraise your posture because if ever a case was governed by the constitution to my mind this is it.

Now, if Your Honor does reappraise, I merely wish to point out that under the constitutional test, which has been most recently laid down in the Wasserman case, in the District of Columbia case, followed by the Fifth Circuit in the Bonet case, and both copies of the opinions were given to Your Honor, it is Your Honor's duty at the end of the plaintiff's case, and then at the end of the defendant's case, to judge the credibility of witnesses and draw your own inferences from the evidence. That's the constitutional test.

Incidentally, the Wasserman case is now officially reported at 424 Federal Second 920. I have a copy of the report here, Your Honor, for your convenience, just last

week's advance sheets. I think that really is all I can add to what Mr. Frates has said.

The Court: Let me ask you one point. I don't [490] want to interrupt any of you much, I'll tell you right now. I will read this case. There's been one basic difference in procedure, Florida procedure, always in the past is that Federal Judges may comment upon or weigh the evidence, and Florida State Judges are prohibited from doing that. Maybe Mr. Frates could answer that. I cannot weigh the evidence under Florida law.

Mr. Frates: No, Federal Judge can't weigh the evidence either.

The Court: Credibility he said.

Mr. Medina: It's a matter of Federal constitutional law that if the constitution applies, governs the way that you try this case is the State Judge under the constitution.

The Court: Okay, fine. If that's in this case I will read it carefully.

Mr. Medina: It's followed by the Bonet case but it says the same thing.

The Court: I have read it once. Go ahead, Mr. Medina, I wasn't cutting you off, I was asking a question.

Mr. Medina: We put all these other things in my [491] memorandum, I want to underline how strongly I feel you should reappraise your situation because to my mind under these new constitutional documents that have developed this is a typical constitutional case dealing with a matter of public interest, namely, a decision of this Court, and if this isn't a matter of public interest covered by the constitution, I just plain don't know what is. Forget the public figure. The public figure point has gotten even stronger during the trial.

And I think independently of the public interest point that would suffice, but you never need to get to that, really, and every case that's come down on this subject matter since

Time against Hill has reaffirmed this public interest doctrine. Sure, you can go back and there are a lot of cases they have in their brief, Dempsey against Time. At the time we lost that the doctrine had not evolved. There are quite a few cases in the early days when Courts thought that New York Times was limited to public officials.

[492] Well, it clearly is not and it's gone from public officials, to public figures, to public interest, and you have decisions throughout the country on this in both State and Federal Courts, all of them unanimous on it today, and they are squarely in point as to this case and that's why I bring it up again.

I know Your Honor has ruled but I would strongly urge you to reappraise your posture. Thank you, sir.

Mr. Frates: Your Honor, one comment. Mr. Montgomery, I think, mentioned when we talked about the qualified privilege yesterday, it was not plain. He was incorrect in that because I am reading from answer in affirmative defense, in ground 10, in 14, and 10 is, "The words plaintiff complains of were privileged in that they constitute a simple report to the public of a matter of public records, to-wit, a judicial proceeding."

And number 14, "The article complained of is privileged in that it merely reports a judicial decision without commenting upon [493] it and without adopting the opinions of the Court."

Mr. Montgomery: Excuse me, where were you reading from?

Mr. D'Aiuto: That's your motion to dismiss?

Mr. Frates: The answer in affirmative defense, gentlemen.

Mr. Montgomery: Excuse me, give me the numbers again, Mr. Frates. Number 10?

The Court: He's giving the paragraph numbers.

Mr. Frates: Look at it, maybe you can identify it from the document. One other comment, Your Honor, if I may go back, and again I don't want to belabor the Sullivan-Times, and I don't want to say anything more than that other than in line with your question about credibility, this is why I think under, let's say you assume that there are still, the ruling in Time versus Sullivan doesn't apply. You then come back and they have vouched for the credibility, so this is not a question where we put on witnesses, they put on witnesses, the jury should now decide the credibility of these various witnesses for the facts presented in this case, they [494] vouch for their credibility, and I submit Your Honor can take those facts in rendering your opinion.

The Court: All right, sir.

Mr. Montgomery: May it please the Court. First of all, Your Honor, so far as grounds of withdrawing the reputation from considration in this particular case, as for a motion to dismiss or a directed verdict, the ruling if any should be for a mistrial by reason of the fact that at the hearing that we had before the Court I specifically asked the Court that in the event the plaintiff's, excuse me, the defendant's position that withdrawal of reputation would be withdrawal of the case, then certainly we would try that issue of reputation and we would put it before this particular jury and the Court in the pre-trial order agreed that the reputation would be withdrawn and we would go forward on the mental anguish and the rest of those damages that naturally flow.

So consequently, I don't, it would be putting the plaintiff in a rather unusual and hopeless predicament that we have gone [495] on in light of the Court's ruling in this particular case as we have.

So I think that should be actually a motion for mistrial, or a reopening of the case to allow the trial of the reputation and give it back to the jury that we have, what we have here, rather than any kind of motion for directed verdict, if the Court please.

Now, number one, Your Honor, we filed a privilege defense, so far as the president of Time is concerned, by which they are bound under oath, interrogatory number 29, when we asked specifically the following questions: "If you contend that any of the matters contained in said publication were privileged, state," that's interrogatory number 29-A, "whether the statements were made in response to request for such information," to which they answered, "Not applicable."

And then all of the various six or sub headings under this, they answered this whole particular interrogatory as not applicable.

Now, so far as the qualified privilege [496] is concerned, we don't, I can't imagine that our Constitution of the United States and the State of Florida and our Courts are so calloused that says that a person who is engaged in any type of litigation may be lied about, that the matter could be reported in any way that the press saw fit without any liability whatsoever. And this has been answered, if the Court please, because when, on the restatement of the law of torts, and I won't belabor this because I have given you my memorandum, I think it fully covers this particular point, but for the record, the publication of a report of judicial proceedings, this is the law of torts, volume three, American Law Institute of the United States, State or Territory thereof is privileged, although it contains matters which are false or which is false and defamatory. If it is, A: Accurate and complete or a fair abridgment of such proceedings, and B: Not made solely for the purpose of causing harm to the person defamed.

Now, the author in that particular [497] article said not only must the report be accurate but it must be fair.

Even a report which is accurate so far as it goes may be so edited and deleted as to misrepresent the proceedings and thus be misleading, and then he goes on, they follow the other language that I have previously submitted to the Court.

Now, going back to the Sutherland case, again, we took this up at pre-trial in order to make a determination as to what evidence would be necessary in order to show whether or not Mrs. Firestone was a public figure, and we submit that in light of the Court's ruling that there was no evidence necessary and that is moot, that has already been ruled upon by the Court.

And likewise, Your Honor, so far as the testimony adduced at this particular trial from one of the witnesses, and the only witness that mentioned the Firestone family it was Russell Firestone, and nothing and nothing whatsoever was said about Mrs. Firestone just as wife. And I dare say that I defy people in this Courtroom to tell me [498] the name of Mrs. Goodyear, if there happens to be one, wife, or any number of famous people's wives that we have here. It is the husband and not the wife.

And likewise, Your Honor, as far as the New York Times versus Sutherland and actual malice is concerned, this was a private matter, not a matter of any kind of public interest. But with Your Honor already having ruled that the New York Times versus Sullivan applies and we go to the law of the State of Florida so far as libel is concerned, we submit that this is libelous per se, that damages are presumed to flow from this particular libel.

As said in the St. Ammons case, when he talks about, he talks about, Time, Incorporated, talks about showing express or actual malice. That is not necessary.

United States Supreme Court in 1968, at Page 999 of the annotation which I have said, said this, "While the

phrase of reckless disregard or falsity of a defamatory statement cannot be fully encompassed in one infallible definition and inevitable it's [499] outer limits will be marked out by case to case adjudication. Nevertheless it is clear that reckless conduct is not measured by whether a reasonable prudent man would have published or would have investigated before publishing that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication, serious doubts."

Now, along those lines, if the Court please, they asked for the words of the Judge. They got the words of the Judge so far as his ruling is concerned.

This, in their rough draft, which was made originally by Mr. Doerner, in Plaintiff's Exhibit in evidence, Number 9, this person up here says, observed, "If anyone could be believed," dash "which Knott doubted." They had in Time up there a researcher who was supposed to have put a mark over each word so far as accuracy is concerned. That was a requirement. And she said that everybody on up the line up until the editor had this file, as she called it, with this in it. [500] That was denied by Doerner.

But when that word was not marked, that showed a serious doubt of the accuracy of this particular matter. They never looked at the Court order in this particular case.

And we submit that it would be a jury question as to whether or not this magazine had serious doubts about the truthfulness of this particular article and as a result thereof nevertheless published it. It was a reckless disregard of the truth.

Our Florida Courts here have held likewise. When it's said that people don't go around—well, let me read this, Your Honor, and I'll end with this. This is Brown versus

Fawcett Publications, 1967, Florida case, 196 Southern Second 465, citation for the record. This is the case, as you recall, where the Court granted a new trial to the plaintiff and the plaintiff received a verdict against this publisher by reason of libel on the grounds that he neglected to tell the jury that in order to support punitive damages express malice must be shown by the plaintiff.

[501] And our appellate court, and I think a certain part of it was denied, in this particular case, this is a final view of our Florida Courts. The advice is that it fails to make ill-will, hostility and intention to defame or injure, wantonness or outrageousness of the tort, that's my wording, the equivalent or the alternative of express malice, but on the contrary, only an indication thereof.

The numerous authorities, supra, clearly show that all such elements are equivalent of express malice and the rationale of all this is obvious. If malice is necessary to warrant exemplary damages had to be expressed, such as quote, "I hate you," close quote, or quote, "I am going to ruin your character even if I have to lie about you to do it," it would reduce the law of punitive damages in libel actions to a farce and mockery and people don't advertise their libels in advance.

Even on Times versus Sullivan we have the rule of law that in order to obtain punitive damages if there was a reckless [502] disregard for the truth in the matter, and this is a jury question, then consequently punitive damages may be awarded. I'm satisfied that I have covered most every point brought up by the plaintiff, by the memorandums submitted to the Court, and of course through the charges which may give a few additional points of law that may supplement our memorandum.

We respectfully show this is a libelous publication, they charged her with adultery which is a crime, they charged

her with unchastity, it is malicious, consequently as a matter of fact, the jury could be charged that in a publication such as this without showing any express or actual malice, as a matter of fact, punitive damages could be awarded.

The Court: Mr. Frates.

Mr. Frates: Just a short one, Your Honor, on Mr. Montgomery's statement about the withdrawal of the damages and the reduction to, or the elimination of reputation, I was not present, as Your Honor knows, but I read from paragraph 6, I mean Page 6 of the [503] transcript, where Mr. Stewart said: "But I would say to the Court this, they have eliminated their cause of action in this case because of libel, mental pain and suffering flows from the damage to the reputation, if they are eliminating it, they are eliminating in effect conceding there has been no damage done by this publication."

There was no stipulation. I have a little difficulty following Mr. Montgomery's argument because he is going from Sullivan cases qualified to common law privilege, I mean common law which is not qualified privileges and completely ignores the fact that if it's qualified privilege every single case says that the burden shifts once it comes in and the plaintiff must prove actual malice.

And there has been not one word of that in this case and this makes this very different from, Your Honor, from a common law case there has been imputation of dishonesty in the business, or there are five elements that malice is presumed from. That's why qualified privilege is a [504] qualified privilege. It changes that rule.

The Court: What qualifies it? Why do they say qualifies?

Mr. Frates: Qualified privilege, Your Honor, has been designated as the report of a judicial proceeding.

The Court: In other words, you could say something may be absolutely privileged, you say this is qualifiedly privileged, why is the use of the word qualified?

Mr. Frates: Because, Your Honor, if it was an absolute privilege, it's something said in this Courtroom, if a witness gets on the stand and makes a statement, I suppose there are extremes where even that, it's, well, anyway, that's an absolute privilege, regardless of the motives.

The Court: Right.

Mr. Frates: If someone is sitting out in this Courtroom and there is a trial going on or they interpret as the news people do, when I say, the news media, then they are interpreting an act of this Court and that becomes a qualified privilege. That's the difference. It's not an absolute privilege. [505] But, to recover in that, once it gets in that category, then the burden shifts back to the plaintiff and it puts a bigger burden on them, no question about that, Your Honor. No question about that. Makes it much bigger.

And eliminates the factor of, because the words themselves are the same, the crime or chastity, lack of chastity, that there's malice inferred, that is not true in a qualified privilege. I don't want to argue about the Courts of this state, the Courts of that state. That's, I submit to Your Honor the law in this case and always has been the law in this state.

So we really, it's really what we are talking about is just common law, qualified privilege, which has always been the law in the State of Florida. What we are really saying, Your Honor, is, to sum up, we think Sullivan applies because of the public interest of this Courtroom. And if you want to call them a public figure, yes, too, but apart from that, the fact this is a Circuit Court, a Judge Knott Courtroom, we feel if [506] Your Honor doesn't rule that then it's a qualified privilege and there just isn't, there's

no question on authorities on that, Your Honor, it's a qualified privilege.

And we come back again that the damages in this case, at the most they could ever, under the Brown versus Miami Herald case, Your Honor, the most that Mrs. Firestone, conceding every argument they make in this case, is nominal damages under the Brown case. I'll stop now.

The Court: Gentlemen, of course the ordinary procedure would be this is all but, since I say, when we get through with this argument here on the motions, regardless of anything else, we are not going to say any more. So if you have anything else I would like to hear it right now.

Mr. Montgomery: On Page 8 of the pre-trial hearing I said this, I was citing a case to Your Honor:

> "Wherein it was the general damages under the 20 Florida jurisprudence libel and slander are those that the law presumes must naturally, proximately [507] and necessarily result from the publication of libelous matter. They are libel whenever the immediate tendency of the words is to impair the plaintiff's reputation although no pecuniary loss has in fact resulted and are designed to compensate loss arising from injured feelings, mental suffering and anguish and personal and public humiliation consequent upon the malicious publication of the false and libelous malice."

At Page 8, after Page 6, Mr. Stewart stated that in the event we withdrew that particular issue from the Court, that then consequently we would be out of Court.

I said:

> "In this particular case of Commander versus Peterson, and of course we want a ruling if the

Court takes the same position as the defendant in this particular case, that if we withdraw this one particular element that we are out. Of course we are not going to withdraw it."

[508] Mr. D'Aiuto: Could I add one other, Your Honor, with respect to Mr. Frates' statement about Miami Herald versus Brown? It's in that memorandum they gave you in support of their motion to dismiss, to withdraw the reputation. I would urge Your Honor to read the decision itself.

In that particular case the newspaper retracted the libelous publication and therefore the appellate court held in view of retraction the plaintiff was entitled to only nominal damages and we do not have a retraction but a continued refusal to retract which distinguishes it.

Also, Curtell versus Tribune, Inc. which is cited in the memorandum, those two cites that are set in there are from the headnotes, and the case itself, if you read the decision, it's only two paragraphs long, and it does not hold as indicated in the headnote. The decision itself says almost nothing, it's almost unintelligible with respect to what the headnotes say, and for that reason I urge His Honor to read those two cases before you take into consideration [509] a motion to dismiss for no cause of action. Thank you.

The Court: Gentlemen, one reason I announced the procedure I am going to follow, because most of these cases I read but they are all going to be read again, that's why I said I wouldn't announce it right now. I feel that I must read them all again. Now, as I say, despite of regular procedure, if anyone has anything to add on any subject I would like to hear it now because when I close it I am going to close it.

Are you sure, gentlemen? Think it over. Do you have any other comments to make, either side?

Mr. Frates: It would just be repetitious, I don't think Your Honor wants that.

The Court: No, not if it's the same thing over again. I am going to read all memorandums again and read the cases. I should read all the cases, I read most of them but maybe not too thoroughly. I am not satisfied yet myself until I read all the cases again on every detail. So if that terminates that, gentlemen, let me say what we are going to [510] do then is go through the charge conference as though all motions here were denied and we will consider then, when we get to a charge, of course there will be many that the defendant will say this can't apply because such and such a motion has to be granted, but we will assume, and I realize we may be wasting time depending on how I rule, but we will assume all motions are denied and that all issues are going to the jury.

We will go through the charges on that basis. I am going to take a recess, gentlemen. Do you want a reporter on the conference? Let me advise, Mr. Frates and Mr. Montgomery, regardless of how we do it and regardless of what objections are or are not raised at the charge conference, I never been, from the beginning of the early days of the rules, that you had to specifically object to every charge that was given or every one that was asked for which was refused, I thought that this was a burden on counsel so I have always asked for a stipulation between counsel and objections [511] are reserved to all charges given, which were not requested by the particular side, and objections are reserved to all charges requested in writing which were refused, so, I mean, you can express yourself at the conference.

But regardless of it I don't care whether you did object to a charge or didn't, I think it should be preserved.

Mr. Montgomery: Your Honor, we will have some Florida Statutes that we do not have in writing.

The Court: Have you given me the numbers of them?

Mr. Montgomery: I will at the charge conference.

The Court: You can give me the numbers.

Mr. Montgomery: Yes, I'll so agree.

Mr. Frates: Yes, whatever Your Honor—the only, I hate to use this word, the only technical problem we have, assuming that Your Honor says Sullivan doesn't apply, then to protect our constitutional rights we have to, we feel, file those charges.

The Court: Well now, this may be right.

Mr. Frates: And this is the only problem that I [512] foresee.

The Court: I think maybe that's right. You submit them. What I am talking about is he will ask for a charge and he will say, well, we are not going to say there's nothing to that. We will go through it as though your motions were denied. Well, I 'm going to mark every charge that you have submitted in writing and file it in the case and file it regardless whether it applies.

Mr. Medina: We should be specific, specifically on 5 through 12, they are constitutional.

The Court: I meant in our discussion you are not going to argue again now when these charges come up, give them, because you have already made them.

Mr. Medina: As long as we have something on the record.

The Court: Every charge you present in writing is going to be filed in this cause so you are not abandoning your request for them.

Mr. Montgomery: Is that so agreed?

Mr. Frates: Yes, sir.

The Court: So that doesn't mean you don't argue against them in the conference, but it means [513] you

don't have to worry about slipping up by not objecting. We will reserve that for both sides and we will put in all requested instructions which will be filed in the cause and I will write on them refused or granted.

Do you want the reporter, let me ask you this, in the charge conference?

Mr. Frates: Your Honor, as far as you are concerned, whatever Your Honor wants.

Mr. Montgomery: I think I prefer the reporter there, I think it would be a good idea.

The Court: If we have the reporter it might be easier in here. I think it's always easier to work on charges in the Courtroom.

Mr. Montgomery: Fine.

The Court: Having them in here suits me fine. Do you think it will take us more than an hour or so? What do you think?

Mr. Frates: We are moving pretty fast, Your Honor. Is Your Honor going to listen to the discussion about them and then announce your ruling later on the charges?

The Court: I am going to put it in, it may not be typed, but I will have a list for you at [514] 9:00 o'clock in the morning, like rulings on the other, plaintiff's so and so granted, others refused, defendant's so and so granted and some refused. Will half an hour be enough for you tomorrow so you can see which charges I am going to give before argument?

Mr. Frates: Yes. I think, Your Honor, that an hour would be ample time.

The Court: All right. With that we will recess until 3:30. Is that all right with counsel?

Mr. Frates: Fine.

Mr. Montgomery: Fine.

The Court: Gentlemen, then if you don't mind, and you think we can do it in about an hour, we will recess until 3:30.

(Thereupon, a recess was taken until 3:30 o'clock p.m.)

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[515] INSTRUCTION CONFERENCE

Mr. Montgomery: May it please the Court, I have put a new set of charges, they are the same as my old, but rather, see where I have deleted them by reason of the testimony, I just redid them rather than marking through the reputation and taking it out and things of that nature because I didn't know what the Court's ruling was going to be.

The Court: All right. They have a copy of this?

Mr. Montgomery: Yes, sir, I gave them a copy and they gave me a copy of some charges yesterday and I recognize your Court's order about, you know, no more charges unless so and so, but I think in this case we are both entitled to make some few revisions anyway.

The Court: I think so. I think you are both entitled to up to this moment.

Mr. Stewart: Along those lines——

The Court: Is Mr. Frates going to be here? You want to wait for him?

Mr. Stewart: No, sir. I have 24 through 48 which is four charges if my arithmetic is [516] correct and I have given him a copy and I have one more that's a two line charge that I will bring in. It's being typed now and when you get to our turn I will have it.

The Court: We will take the plaintiff first anyway.

Mr. Stewart: All right. I will have it.

The Court: Yes, let me get organized here a minute.

Mr. Montgomery: Yes, I need a minute myself.

The Court: Mr. Montgomery, as I understand your old set is out?

Mr. Montgomery: Yes, sir, I had the secretary delete the portions that I thought needed to be deleted and gave you a new set as we wished it.

The Court: Appreciate it. Mr. Stewart, your original set of charges start 1 through something?

Mr. Stewart: Yes, sir, 1 through 15, Your Honor, I believe, and I think that you will find that number 4 has been eliminated, withdrawn, so that there is no number 4 in your set.

The Court: My set is not numbered.

Mr. Stewart: Excuse me, may I number that?

[517] The Court: Would you take them and number them?

Mr. Stewart: I have the verdicts here also, Your Honor.

The Court: Good. I am going to let him number, if you will, Mr. Stewart, if you will number your first set there right now and let them compare the numbers so we can go through by the numbers.

Mr. Stewart: Yes, sir. Your Honor, I have numbered them, you will find there is not, for the record, a number 4 in there.

The Court: Number 4 is intentionally missing, right?

Mr. Stewart: Yes, sir.

The Court: Very good. I believe, does everyone have, both sides, copies of their requested charges and the other side's requested charges?

Mr. Montgomery: We think so.

The Court: Now, gentlemen, let me just say again, if you don't keep it in mind, it may be hard for you not to remember that we are only going through these as though all motions were denied. I realize there has been some requested here, in fact some motions are [518] granted, we

may not need them, but we will have to go through them as though all motions or subjects were still in issue and then what we'll do, we'll go through the plaintiff's first and as we come to each one of the plaintiff's I will hear any comments that counsel for the defendant wish to make on it and objections or comment, although we know we are going to reserve objections anyway, and then I will hear from the side requesting and the answer to those comments if there is an objection.

Is that satisfactory? Think we can go through all right that way?

Mr. Montgomery: Yes. I have this FSSA 61.08, just that portion, no portion shall be granted to an adulterous wife. 61.08 and 61.041, no divorce shall be granted in the event both parties shall be found guilty of adultery.

The Court: You want me to charge the jury to this effect?

Mr. Montgomery: Yes, sir, to that effect.

The Court: These are the only two statutes?

Mr. Montgomery: No, sir, the rest I have in my [519] charge.

The Court: He wants these two charges. I will let you comment on these, Mr. Frates.

Mr. Frates: Well, the statute about no divorce will be granted to a wife guilty of adultery——

The Court: You mean alimony?

Mr. Frates: Alimony, is really immaterial in this case and the issue under any phase of this, whether they are talking about Sullivan, qualified privilege, just straight common law, if I call that the third one, I mean the common law without the privilege of the Court proceedings, it's immaterial.

Now, every witness that the plaintiff put on the stand, they didn't know anything about this. There is no evidence in this case that anyone knew this statute so how can it be

relevant and material in any way? The fact that it's a legal statute has got nothing to do with the facts in this case, Your Honor.

Now, if someone had testified sure, said sure, I knew that here in Florida you couldn't have a divorce or you couldn't have alimony if you were guilty of adultery and [520] there was some question about it, but I published it anyway, I didn't care, I knew it wasn't true but I published it anyway.

Well, Your Honor, one of the things we have skated around on in this case, young lady, I guess you can put it on there, this final judgment says a lot of things that are inconsistent with the law.

It certainly says, and there's no dispute as to how much it says there, they are both guilty of adultery, no question about that in my mind, sir, much of it is, I don't believe, which obviously some believe, so why should this jury be given, they are not lawyers, and the people who wrote these articles are not lawyers.

So I think Your Honor would have to sit down and charge them what are the grounds of divorce. I think this would lead to another one, the domesticated, they can't be domesticated is not a ground for divorce in Florida. So we just get on one further legal pile right after the other but that has nothing to do with the issues in this case.

[521] The Court: All right. Mr. Montgomery?

Mr. Montgomery: May it please the Court, we believe it is absolutely very relevant by reason of the fact that in order, if you are going to give the jury a copy of the order, just like you would give them a copy of a contract, if this was a contract case, you would have, it would be imperative that the Court charge them on contract law.

This happens to be a divorce final judgment, and consequently you must charge them so far as what the law says as to those particular judgments.

If Your Honor is not going to take judicial notice, which I have asked, that no alimony can be awarded an adulterous wife in the State of Florida, then consequently if it's going to be in a charge it ought to be in a charge to assist these people in interpreting what the Judge said in that particular order and it is entirely relevant and it's also relevant, we attempted to bring this out from Mr. Farish and Your Honor at that particular time said no, it is a matter of law to be charged.

[522] And number two, so far as this particular relevancy of this law on the other hand is that they had a legal department, that the legal department was open at that particular time, that they made no inquiry and it's just one other element going to the reckless disregard, wantonness, willfulness and hostility of this particular defendant. And Your Honor, that is the law.

That the Court, that our legislature says that an adulterous wife may not get alimony. Therefore, then consequently, it is obvious that the Court did not allow her to get, in other words, did not find her guilty of adultery.

Now, also, the question that I wanted to ask and attempted and proffered to Judge Knott simply was did you find her guilty of adultery and the Court would not allow me to ask that question before the jury but on the proffer he said no. And you said, again, at that particular time, that it would be a question of course, overall, and it would be subject to a charge. And I think the jury far from being irrelevant, it is the most [523] relevant thing in this particular case, if the Court please, because the decree does not find her guilty of adultery anywhere in there and this is just one more aspect of this particular case for which the jury needs in order to make a proper and true determination of this cause.

Mr. Frates: Well, Your Honor, Mr. Montgomery wants you to take the law and charge what the law is and

says by virtue of that this says that because she got alimony, and that's not the facts in this case.

In other words, this document, whether it's right, wrong, confusing or what it is, and Mr. Montgomery makes some statements about it, to me it's so clear, not whether they can or not, but you take the first two paragraphs, it's just as clear as a bell to me. It might not be to Mr. Montgomery.

And as clear as a bell to me that he found both of them guilty of adultery in here. So to charge them on the law on this is just saying in effect I Judge Smith instruct you that in that decree he didn't find them guilty of adultery because if he did he [524] couldn't give them alimony. He did find them guilty of adultery and he did give them alimony and he did find the equities with Firestone and he did say his counterclaim was granted.

The Court: What's the other—excuse me. Did I cut you off?

Mr. Frates: No, sir.

Mr. Montgomery: The other portion of the statute was 61.041 where both parties under our legislature are found guilty of adultery there certainly shall be no divorce. There certainly was adultery in this matter. If the Court finds that both parties have been guilty of adultery, then there shall be no divorce.

My argument would be the same on both of those.

Mr. Frates: Your Honor, what he's trying to do is to say this is the law, doesn't make any difference what's in here. He's trying to make the jury the appellate court on this final judgment.

Because there's one factual thing that we know, there was a divorce, there is one [525] factual thing, he has said in here, by using the word much, and he goes on and describes it and says much of this I doubted, that means

there was some, he has said there was adultery on both sides and he granted the divorce. So this jury is not a group of lawyers sitting as appellate court on Judge Knott or the final judgment.

And all he wants to say is you instruct them that way, Your Honor, then that automatically modifies this decree, judgment, excuse me.

Mr. Montgomery: Just one more matter, Your Honor. Of course we take the position that the Court, as a matter of law, should rule that of course the Judge did not find her guilty of adultery by reason of a particular statute.

And likewise, again, going back to like a contract case, if there was a date that was in dispute, so that perhaps the statute of limitations would be the question before the jury, you'd have to read the jury what the statute of limitations were in the particular case or a rule of perpetuities [526] and things of that nature.

This is nothing more than an aid to the jury so far as this finding is concerned. And I can't understand why or how a person can come up here like Time, Incorporated, and say that it's a jury question as to whether the Court found her guilty of adultery in this particular order when the legislature itself, and my goodness, Judge Knott being the senior circuit judge here, with a wealth of experience, did not say, what they are saying is Judge Knott didn't know about that statute, is that going to be a question or he made a mistake, are they going to be arguing he made a mistake in this particular order. I have nothing further.

Mr. Frates: Your Honor, again, we are getting around to the interpretation of it and Mr. Montgomery or one of us can't read. The defendant's husband——

The Court: I don't think we are at the point of arguing as to whether to give the statute, as to whether the interpretation we put on this thing, it's a purpose of whether

this [527] statute is required to be given as a charge or not.

Mr. Frates: All right. I say in this case those statutes have absolutely nothing to do with the issues in this case.

The Court: I think I understand your point and I think I understand yours and I'll just have to decide it. I made some notes here. Let's take the plaintiff's requested charges.

The first two are standard jury charges which I will give in every case. You see the first pages?

Mr. Stewart: Yes, sir, Your Honor. We have no objection to those, 2.1 and 2.2.

The Court: 2.4, Mr. Montgomery, I don't believe this is, I don't think these are applicable as distinct claims. They are issues, maybe, but not claims. You see that charge about distinct claims means for instance if there was a claim——

Mr. Montgomery: I understand. I agree.

The Court: I don't think I'll give 2.4. I'll announce these, the rest of these things I probably won't, as I say, I will announce in the morning, but these standard charges— [528] 3.1, I don't think you need to comment. You object?

Mr. Stewart: Yes, sir.

The Court: I think I have heard that, the request, that the article is libelous per se, any more argument on that or have I heard your argument on that?

Mr. Stewart: I think we have covered it many many times.

The Court: And I think there's arguments, I think both of you discussed this in your memorandums, have you not, about this point?

Mr. Montgomery: Yes, sir.

The Court: Have you, Mr. Stewart?

Mr. Stewart: Let me just go back over this, Your Honor, to make sure that—of course we said it was the

Sullivan case to start off with. That's under the constitution. If Your Honor rules with us on that——

The Court: We are not to that.

Mr. Stewart: No, I am just explaining 3.1 would be out. Secondly, we have given Your Honor a memorandum on the common law qualified privilege apart from the constitution and that was argued on the motion for directed [529] verdict.

Now, if Your Honor rules with us on that, then 3.1 is out, also, because what a qualified privilege does is take away the per se. Then they have to prove malice under qualified privilege and that's always been the law, before Sullivan and since Sullivan and forever and ever.

I just wanted to make sure that we were clear in saying to Your Honor why, under either interpretation, we don't think 3.1 should be given.

Mr. D'Aiuto: May I respond to that, Your Honor?

The Court: Yes.

Mr. D'Aiuto: First of all, as he indicated, if Times versus Sullivan applied, which has already been ruled at one time as not being applicable, of course it wouldn't apply. But the qualified privilege is an affirmative defense and under the law it's still libelous per se. The only thing it does, they have the affirmative burden of proving a qualified privilege. If they do that, then they shift the burden back to proving actual malice. That doesn't change the [530] nature of the tort. It's a matter of law.

If you accuse a person of a crime, that's libel per se. You can plead the defense of qualified privilege and under appropriate instructions, they have pled this was a qualified privilege, therefore they have to prove that they fairly and accurately reported a judicial proceeding without malice or without ill will toward the plaintiff.

If they prove that, then the burden shifts back to the plaintiff to prove actual malice before she can recover but

it does not change the nature of the libel from libel per se or libel per quod and this is a libel per se case, imputes crime, and it imputes unchastity to a woman, so that is a question of pure law which has to be decided by the Court.

Mr. Stewart: Now, Your Honor, I would like to respond to that because I think he's made an incorrect statement of the law and I don't think there is any question about it, you can take any one of those cases that we have in our qualified privilege memorandum that [531] we've given to Your Honor, I think it's entitled burdens of proof under common law libel, it's three or four pages long, and under any one of those cases, and everyone of our Florida cases, the minute there has been a determination that it's qualified privilege, then it is the plaintiff's burden. The defendant doesn't have to prove anything at that point.

It's the plaintiff's burden to come in and prove the ill will or the spite, in other words, to prove actual malice. And that's what the law is, there isn't anything that the defendant has to prove to shift it back to them. Once is to determine that it's qualified privilege.

The Court: Who determines—is it your contention it's a question of the fact for the jury under proper instruction to determine if you have a qualified privilege?

Mr. Stewart: It's a question of law.

The Court: You request the charge?

Mr. Stewart: We have charges.

Mr. D'Aiuto: Their own case, Your Honor, cited in the memorandum is Abraham versus Baldwin, [532] the burden of proving a plea that the communication is privileged is on the defendant when it was established or conceded that the communication was privileged, the burden is then cast on the plaintiff for improper motive.

So they have got to prove the elements of qualified privilege before they are entitled to have the charge back to the jury that we now have to prove actual malice.

The Court: There is law about the subject of qualified privilege for reporting, that is for news media to report judicial proceedings.

Mr. D'Aiuto: That's correct.

Mr. Stewart: That's what we are talking about, and once we show, as the article itself shows here, that this was a judicial proceeding, then that establishes the qualified privilege. That's what the Abraham case is talking about. That establishes the qualified privilege.

Then at that point, on the element of malice, they have to come forth and show the malice.

The Court: Okay. Thank you. Let's go on. 3.9 [533] now is just greater weight of the evidence, means more persuasive, I guess that's a standard charge.

Mr. Stewart: Yes, sir, that would not be applicable under New York Times versus Sullivan.

The Court: I understand that. Now, their number—understand, it's going to go on the record that you object to everyone of these charges. What I am going to do is let you comment on them. If you don't comment on them, I don't write down that you agree to them. See what I mean?

Mr. Frates: Yes, sir.

The Court: If you don't comment, you don't abandon your objection because I am going to make sure that everybody's objections are sustained to every charge.

Mr. Stewart: The only comment I would make on their number 1, then, Your Honor, is that if you find that this was not a case of qualified privilege, then they would be entitled to something along these lines.

The wording of this, I don't think is very clear. I think there is a better way [534] to say, present to the jury, what they have here in number 1. It talks about slander, which is not involved in this case.

Mr. D'Aiuto: We'll amend that to mean libel.

Mr. Montgomery: Although that's what the case says.

The Court: You can respond to him. Just wait. I mean as soon as he gets through.

Mr. Montgomery: Excuse me.

The Court: Any other comment on that, Mr. Stewart?

Mr. Stewart: No, I just think it's not very clear about it. I think you are going to see they have some others in there that if you are going to give a charge along those lines——

The Court: That might be true.

Mr. D'Aiuto: The only comment we would make would be that slander should be changed to libel. We quoted it verbatim out of the case.

Mr. Montgomery: That was a libel matter but they used the word slander. I don't know why, typographical error or what, but any way, I pulled it correctly, it should be libel.

The Court: Number 2 is a statute.

Mr. Montgomery: Yes, sir.

[535] Mr. Stewart: Has Your Honor got the statutes there? I am not sure that's the one that you give. I think that's the penalty portion. You want to just give the definition portion, what is adultery under the——

Mr. Montgomery: Excuse me, Your Honor. In the event you give my charge number 1 it will not be necessary to give the statutes themselves pertaining to adultery if you will tell them that the charge of adultery is a crime. Do you follow what I am talking about?

The Court: You remember his number 1, Mr. Stewart? The way I feel is, if I charge them, one, adultery is a crime, I don't think it would be necessary to charge the whole statute. I think you could just say, if I decide it's proper to say that, just say that a person who is guilty of adultery,

or that adultery is a criminal offense, just those simple words.

Mr. Stewart: Agreed.

Mr. Montgomery: Then I will withdraw the charges on adultery.

The Court: All right. Withdraw number 2?

[536] Mr. Montgomery: Yes, sir.

The Court: How about number 3?

Mr. Montgomery: Same.

The Court: Withrawn. Number 4 is another subject. Gentlemen, of course I realize you have made your argument but in any event, no punitive damages should be allowed, if I allow the question of punitive to go to the jury, how about this charge?

Mr. Stewart: I don't think that's a correct statement of law, Your Honor.

The Court: I think you have a requested charge if I give punitive damages on this subject.

Mr. Stewart: I don't recall putting one in there.

The Court: Maybe not.

Mr. Stewart: I don't think we have one in there.

The Court: I realize you don't think it should be an issue.

Mr. Stewart: Your Honor, what they are doing in this one, and they do it in the next one, too. In the Sullivan case, and all of the cases that have come down after Sullivan, they talk about something called actual malice, which is in quotes.

That is not the type of malice that [537] justifies the impetus of punitive damages. It is a different standard, it is a different definition and there's no similarity as between the two.

It's a constitutional malice which has been held and defined by the United States Supreme Court to satisfy the

imposition of liability under the first amendment. And that definition is the constitutional definition, is reckless disregard which has also been equated with serious doubts as to the truth. Those are the key phrases under the constitution.

Now, what they have done in these two charges coming up, and there may be the same problem with some of the other charges, is they have taken the constitutional malice and put it in a charge that they are entitled to recover punitive damages if they prove the constitutional standard of malice.

Now, even in the Sullivan case, when a Sullivan case is tried, if there is a claim for punitive damages in the Sullivan case, the Judge has to give two definitions of malice, the one definition being the [538] constitutional definition, to reach liability, and the other definition being the normal express malice of ill will, hatred and spite and intent to injure, that sort of thing, which is always justified the imposition of punitive damages, and that's exactly what happened.

This is discussed in detail in the Butts opinion, in the footnotes of the Butts opinion where they did that. So this charge right here is wrong, and the next charge is wrong, too, because they've got the wrong standards in them.

The Court: All right. Any comment, Mr. Montgomery?

Mr. Montgomery: No, sir, we stand on our citations.

Mr. D'Aiuto: Refer to Brown versus Fawcett Publications which is in the memorandum.

Mr. Montgomery: And Reaves versus Foster, Mississippi case, it's got 1867, should be 1967, it quotes Sullivan. It says even under the Sullivan doctrine what was needed.

The Court: All right. I'll read them. 4 and 5 are the same, I mean on the same subject.

[539] Mr. Montgomery: Yes, sir. Number 6——

Mr. Stewart: That will be covered in the comments that Your Honor made about adultery.

The Court: I think so. Also, I try not to give any charge which contains argumentative things such as the things that the lawyers might argue to the jury. I try to cut them short. I think this one might have some argumentative language in it.

Mr. Montgomery: We don't wish to argue, Your Honor.

The Court: I don't think I will give this unless you want to argue that.

Mr. Stewart: 7 I think is covered by Your Honor's comments on adultery.

The Court: In other words, if I give a charge and you both agree, I don't mean you agree I should give it, but if I give it, I would merely make the statement that adultery is a crime under the laws of this state.

Mr. Stewart: Yes, sir.

Mr. Montgomery: Well, it would be under libel per se, in other words——

The Court: That's different, you are getting into a different charge about whether I [540] give a charge that adultery—you see, if you give that charge about libel per se, that says a crime.

Mr. Montgomery: Crime or unchastity.

The Court: Well, a crime, and then I say adultery is a crime, so if I give one I could give the other one. But I may not give the one. This one, I agree, I wouldn't give it on the subject, I think the other would be better.

Mr. Montgomery: We will withdraw 7, Your Honor.

The Court: All right, 7 is withdrawn. Now, this isn't, isn't 8 on the subject that you have withdrawn, on the damages?

Mr. Montgomery: Yes, sir, I think you're right, sir.

The Court: All right. I mean, you can still leave it in, if you want, but I am going to deny it because I think this covers an element of damage, ill repute.

Mr. Montgomery: Wait just a second, Your Honor. I have withdrawn the reputation from this particular charge, these are the other damages.

Any person who suffered an injury by [541] reason of a wrongful and unprivileged communication of a libel has a right to recover damages. Compensatory damages for this defamation, I am reading down here where it says for the reason, include one, pecuniary loss, direct or indirect or special damages, to damages for mental suffering.

General damages are those that the law presumes must naturally and proximately and necessarily result, and it includes all the general damages with the exception, so it would be the lower part of this where I have deleted the reputation that would be applicable in the charge because if it is malice per se those damages are presumed so far as mental——

The Court: You don't claim any pecuniary loss.

Mr. D'Aiuto: We can withdraw the pecuniary, that should be struck out, we withdraw parentheses loss, direct or indirect or special damages.

The Court: Mr. Stewart, of course you have argued on your motion, your reasons for saying that having withdrawn the damages as to loss of reputation, or we have no case at [542] all, that's to be considered under the motion, but assuming that I hold they still have a case, and for some kind of damages, then I will hear your comment on that.

Mr. Stewart: Well, I am not clear at this point whether they have conceded, the first two paragraphs are out, that refers to neighbors, ill repute, integrity of the neighborhood. That's purely reputation.

The Court: I think that's out because that goes to reputation. Now, the only statement they have in there, which I think is still in, is mental suffering. I guess that's it, mental suffering.

Mr. Montgomery: No, sir. Actually, there's mental suffering and anguish and public humiliation. Your Honor, you can't, if I might be heard on that one point.

The Court: Let Mr. Stewart, first.

Mr. Montgomery: Excuse me, I thought he was through.

The Court: Go ahead, Mr. Stewart.

Mr. Stewart: Public humiliation is out of this case, Your Honor. They said, and I am reading from page five, that they are going [543] to go forward simply on the mental pain and anguish of Mrs. Firestone, period, that was their representation to the Court.

What is there that humiliation comes from, it comes from the damage to the reputation which is out of the case. We argued also that the other went out, too, but you are going to take care of that when you rule on the motions, but they didn't put it in, they haven't filed any pleading setting up what they are proceeding on.

The only thing that we have to go on, at this point, is their statements that were made at Friday's hearing which are in the transcript here, and they said just mental pain and anguish, and that was all and that's what they were asking for at that point.

So this is, this business about personal and public humiliation, that's out of the case, that's not in this case as the thing stands now.

The Court: All right, sir.

Mr. Montgomery: May it please the Court. At page seven I pointed out to the Court, 20 Florida Jurisprudence, libel, which is cited [544] in my memorandum, and then I said, and it says, I was quoting, and these damages are designed to compensate loss arising from injured feelings, number one, mental suffering and anguish, and personal and public humiliation consequent upon being malicious publication.

Your Honor, assume a person has a bad reputation, a publisher can't go around and say if he has a bad reputation in the neighborhood I can say anything in the world about it.

The Court: No, I don't think that's what we are arguing about.

Mr. Montgomery: But you can have a bad or good reputation and have a reputation, in other words, reputation can be damaged, but the humiliation, that is a mental thing.

The Court: Yes, what they argue is that it comes from loss of reputation, they are not saying mental anguish.

Mr. Montgomery: Injured feelings.

The Court: Injured feelings could come without damage to reputation, I would think.

Mr. Montgomery: I would think so.

[545] The Court: But public humiliation, I have some doubts that that would come without damage to reputation because it's public, see.

Mr. Montgomery: All right, sir.

The Court: I will not give this as it is. Number 9 is with reference to punitive damages.

Mr. Stewart: I'm looking here, is that the exact language of the standard instruction?

The Court: 6.12, but if it is, if it is I will probably give that one.

Mr. Stewart: It's——

Mr. Montgomery: I'm not sure it's applicable. That is a charge, and the reason I gave two of them is because I didn't know which one would be applicable, that's 6.12, Your Honor.

The Court: Looks to me like if I give one that would be the one to give, and if one is entitled at all to be given.

Mr. Stewart: This goes back to my comments on the others, that they had the incorrect test in those others.

The Court: I think, gentlemen, if I give one on punitive damages this would be what I would give. I think it's applicable and it goes [546] on to you may consider the financial resources. Do you have any more comments on this, Mr. Montgomery?

Mr. Montgomery: The only thing, Your Honor, in regard to what I wish to show pertaining to the net worth of the company, this particular charge which has been approved, says financial resources. And I think that the income for the year, likewise, you mentioned the net worth, and the charge says financial resources.

The Court: I am going to check the citation on this charge. I remember a big argument when we were making this up, when the committee was making this charge up. I have always felt that, you see, you might make a lot of money or suppose they lost money this year. That wouldn't mean that they didn't have a lot of net worth, see, or if they made a lot of money it wouldn't mean how much they were worth.

That's why I feel that the year's income is not material, in this particular thing, because suppose they lost $100,000 this year, you wouldn't want them to come in [547] and show that and say therefore we don't have any assets or net worth because that wouldn't necessarily be true.

I think, gentlemen, I will give this charge, if I give one, if I allow this subject to go to the jury. Number 10.

Mr. Stewart: That would, for the record, Your Honor, that would dispose of their number 4 and 5.

The Court: I believe so, yes. I said I wasn't going to say what I was going to do right now, but some of these are pretty obvious I think to me. And number 10, nonetheless libel——

Mr. Stewart: That's not an issue in this case. We haven't attempted to sluff this off on somebody else or anything else.

The Court: Well, what we had in mind is probably was, well, whether you say well, somebody else——

Mr. Montgomery: Said it.

The Court: Of course somebody else didn't publish it. Yes, they did, some newspapers published it. What do you think? They don't claim anything about not having [548] published it of course.

Mr. Montgomery: Yes, well, they say, this paper published it first and maybe they published it first so maybe they shouldn't be liable, so to avoid speculation, and that is the law, anyone who republishes a libel is just as liable as the person who published in the first place.

And also, we have, there was a question in here at one time, especially in taking Delaney's deposition, have you withdrawn the fact that he's an independent contractor, something of that nature.

Mr. Stewart: No, sir.

Mr. Montgomery: Then consequently they might say Delaney told us and he's just an independent contractor, doesn't make any difference if he told them, they got it from the Daily Mirror or whatever they got it. If it's wrong, it was published.

Mr. Stewart: I think you have got to look at this in view of the cases of, let me get the correct cases here, the Tribune cases, the Associated Press cases here in Florida because Layne versus Tribune Company, and [549] Berger versus Miami Herald Publishing Company, which we have cited in various memorandum, because what they hold, this would be directly contrary to the law in those cases because what they hold is if you rely on a reputable news gathering service, such as the Associated Press, which is what was involved in one, and I don't know whether it was involved

in the other case, as a source for your publication, and you believe what they give you to be true, and you don't act, we have a charge in there on this, with carelessness, wantonness and recklessness, that's in our charges.

The Court: Don't you think what he's trying to get at is that the mere fact that someone published it first does not in itself relieve you?

Mr. Frates: Yes, it does.

The Court: If someone else published it first you are relieved from liability? Suppose you know it's false.

Mr. Frates: That's entirely different. If you publish it knowing it's false, that's entirely a different question.

[550] The Court: Let me read those cases that Mr. Stewart just cited and I will decide. I am not sure about this.

Mr. Stewart: I think what Mr. Frates is saying on number 10, if you considered anything along these lines, it would have to be amended to say published knowing it to be false at that time.

The Court: What he means is that, and this is true, whether it should be charged or not in any respect, I am not saying, but it is true, the mere fact alone, and say, suppose I publish something that is absolutely false and you just say, well, there it is in one newspaper so I am going to publish it in my newspaper.

That alone, because it's been published, published before doesn't absolve you. It depends on the——

Mr. Frates: No, sir, if you took the wire service, took certain newspapers, let's take the wire service.

If you accept, and there's no doubt in Florida, Your Honor, there are several cases on this, where they printed AP dispatches or news service dispatches, [551] which were wrong, which were false and which were defamatory, and they said they received it in the normal course, they didn't know it was false and they printed it.

The Court: I will read those cases. Mr. Stewart has given them to me.

Mr. Stewart: Yes, sir, they are cited specifically on our charge number 19.

The Court: We will get to that. All right. Number 11.

Mr. Montgomery: That is if the qualified privilege, Your Honor, if you so find.

The Court: This is under the previous finding, working under qualified privilege.

Mr. Frates: Your Honor, the trouble with this, it takes out sentences and it's trying to talk about what a qualified privilege is and takes it out of context.

When you say nothing to be admitted, well, obviously they want that so they can say, well, something was admitted, but that's not it. It's got to be, it has to be the entire charge on the qualified privilege which I think we have submitted which accurately delineates what that is.

[552] The Court: All right. Number 12. I don't see, a dispute about—you have filed a defense that this is true, isn't that right, truth?

Mr. Stewart: Yes, we have.

Mr. Frates: Well, truth, this would be right if there wasn't qualified privilege.

Mr. Stewart: It's an alternative defense.

The Court: I see.

Mr. Frates : But if there's a qualified privilege, and of course obviously it wouldn't be accurate if Your Honor ruled on Sullivan.

The Court: All right. 13. This one says while the publication reported judicial proceeding as privileged.

Mr. Montgomery: Withdraw that.

Mr. Stewart: No objection.

Mr. Frates: It's a good charge.

Mr. D'Aiuto: Because it's not complete. That's why it's a good charge.

Mr. Frates: Gee, we are about to agree on one of theirs.

The Court: You think maybe we ought to give them?

Mr. Stewart: Yes, sir, if they withdraw it we want to request it.

[553] The Court: Plaintiff withdraws their number 13 but defendant requests that that charge be given, in other words, they adopt that as a charge they are requesting.

Mr. Stewart: Yes, sir.

The Court: All right. Now, the record shows that. I am at 14. Let's see.

Mr. Frates: Your Honor, I don't know, I assume that they get carried away with mental suffering and anguish.

Mr. D'Aiuto: Typographical, strike out the second——

Mr. Frates: And injured feelings——

Mr. D'Aiuto: And strike out public.

Mr. Frates: Injured feelings from what, excuse me.

The Court: One at a time now so we can get through with this. Mr. Frates, you all say first, these are their charges.

Mr. Frates: One, injured feeling is correct, injured feeling for what. They have withdrawn the reputation, that's just not applicable. If there is anything applicable it's the mental suffering and anguish which we say there is not, if there [554] is one that's applicable, that's it, and that's the only one.

The Court: What's your comment, if any?

Mr. Stewart: Let me add one other thing, too, Your Honor. I don't think you should tell them that the law presumes damages. I think that's something under the concept of the standard jury instructions that you don't say the law presumes this. That there is a presumption of this or inference of that, any more.

If they are entitled to recover in this case the damages that you may consider are such. That just gets them over a pleading matter, or a proof matter, not something that you tell the jury about.

Mr. D'Aiuto: Well, Your Honor, if this particular charge, with respect to should you find the defendant publication was libelous per se, this is taking into assumption their affirmative defense of qualified privilege, so how it would come in would be if you do not find that the defendant proved their qualified privilege, then this article is libelous per se, and [555] if you therefore find it was libelous per se, you should consider those damages which the law presumes, naturally, approximately, flows from it, because libel per se has presumptions, it's a conclusive presumption according to the law on certain damages that flow from a libel per se.

Mr. Montgomery: Likewise, Your Honor, we have deleted, where we made a typographical error, after mental suffering and anguish, and we have deleted and public, personal and public, so it would just read personal humiliation consequent upon malicious prosecution.

The Court: I see.

Mr. Frates: Qualified privilege in this case is a question of law in our opinion for Your Honor to rule on, whether it applies. If it applies, then there is a certain charge that should be given. If it doesn't, Your Honor rules that it doesn't, why, then there are other charges.

The Court: Okay. Let's go on, gentlemen. 15. Again, I say if you don't make any comment it doesn't mean you agree that this should [556] be given. I am giving you a chance to comment if you wish.

Mr. Frates: We object to it, Your Honor. It's sort of a confusing charge. I don't quite understand what they mean. We object to it.

The Court: All right. We'll go on. 16. About retractions.

Mr. Frates: Again, Your Honor, I don't think this is complete because there is no absolute obligation, it might be right if we are not talking about qualified privilege, but

the fact that you don't retract, if you believe that it's, that you were accurate that it was true that you fulfilled your legal obligation, the fact that you didn't retract, in and of itself, doesn't mean malice, it's one of the factors.

The Court: It couldn't be one of the factors, I mean, obviously you're not going to retract, as a practical matter, if you think that the article is true and all, and things like that, probably wouldn't retract.

You are asked to retract because you [557] are told by someone that the article is untrue. Then whether there's failure to retract or not would seem to me a question of fact, did you obviously know it was untrue and refused to retract or did you have a good reason not to retract.

Mr. Frates: One of the things, we are getting back to the third ruling, I think a fair interpretation, and these letters, there was no request to retract.

Mr. Montgomery: Your Honor, I am going to withdraw the charge.

The Court: Very good. I'm sorry.

Mr. Montgomery: After further consideration I think that probably that charge might be inviting reversible error.

The Court: I am sorry, we should have listened to you.

Mr. Montgomery: Can I interrupt you when I am going to withdraw a charge?

The Court: You interrupt when you are going to withdraw a charge.

Charge withdrawn, number 16. How about 17?

Mr. Frates: Again, Your Honor, emotional stress [558] resulting therefrom, that is not correct. See, what they do is pull back the reputation, now that the trial is over they want to put it back in. Emotional distress from what. There again is one element, if there is one, we say there isn't, and I don't want to go through that again.

Mr. Montgomery: It would be repetitious, I just gave that charge.

The Court: You want to withdraw that?

Mr. Montgomery: No, sir, if you are going to give one, in one alternative.

The Court: I shouldn't give this one and the other one, both.

Mr. Montgomery: Yes, sir.

Mr. Frates: This raises another point, Your Honor. It's our position that the posture of the evidence on the damages only if there is the mental pain and anguish is what occurred in the past, no evidence there's going to be anything in the future, no mortality tables, no evidence at all in which this can be projected in the future, if it is an element.

The Court: All right. I made a note of your [559] position on that. Number 18. I think this is—I doubt if this is—if I say certain common law statutes are in force, they don't know what that is. I will deny 18. I will announce that.

Mr. D'Aiuto: Your Honor, may I be heard shortly on that? It's been quite apparent throughout the trial that Mr. Frates is making his position that Judge Knott granted a divorce on grounds which are nonexistent as far as he's concerned under the law. The law with respect to the common law of——

The Court: If I may interrupt you, you misunderstand. I think he made that argument in support of objections to evidence that was offered. But Mr. Frates takes the position now, as far as argument to the jury, in his position, he's not going to be able to argue that Judge Knott gave a divorce on grounds that are not existent. You don't expect to argue that to the jury, do you?

Mr. Frates: No, sir.

The Court: You can't, in view of the position you take that we should not say anything about the grounds. I don't mean you [560] shouldn't say anything about the grounds, but you are not going to say, you see, if you object to me saying, giving them a charge that an adulterous wife can't have alimony, by the same token I can't give them a charge that there is no such ground as incompatibility.

Mr. Frates: In final argument you can make fair inference and comment on this.

The Court: You are not going to say there are no grounds for divorce on such and such.

Mr. Frates: Not unless Your Honor charges these others.

The Court: That's why you say I shouldn't give the others.

Mr. Frates: Yes.

The Court: That's what I mean. You understand.

Mr. D'Aiuto: I understand, Your Honor.

The Court: So I think I will deny 18. We got a lot more to go on the defendant's. Take the first one through fifteen. One is already going to be given, that's a standard jury charge.

Mr. Stewart: 1 and 2 were covered.

The Court: 1 and 2 were requested by the other [561] side, too.

Mr. Montgomery: 3, we object to that on the grounds it's commenting on the evidence, it conflicts with the standard charge 7.1 and we have punitive damages involved in this particular case, if the Court please.

The Court: This is generally charged under, you know, by a corporation being entitled to the same right, which of course it is, in the standard jury charge we say which should not, well, you are familiar with it, we move simply, for any party, for or against, and of course you can argue under that charge what that means.

You can't have feeling for or against either party just because of their position. It was the intention of the, of us to cover it in an impersonal way.

Mr. Stewart: We are requesting number 3 to be given.

The Court: All right. I'll consider it. Number 4. There is none.

Mr. Stewart: There is no number 4. Before you proceed on, Your Honor, let me state for the record that numbers 5, 6, 7, 8, 9, 10, 11 [562] and 12 are all charges which are formulated and drafted and presented to Your Honor in support of the doctrine under the New York Times Company versus Sullivan and the constitutional protections of the United States and the Florida Constitution, freedom of speech and freedom of press.

The Court: Then, gentlemen, that's been argued and there would be no reason to discuss these unless I change my position.

Mr. Montgomery: That's right.

The Court: You agree with that, Mr. Stewart?

Mr. Stewart: Yes, sir.

The Court: In other words, if I don't change my position on Times versus Sullivan these charges would not actually be applicable but they are still in here as being requested, you understand. Number 13.

Mr. Montgomery: We object to that, Your Honor, on the following grounds. It says if libel is proven with "convincing clarity" that's in opposition——

Mr. Stewart: Excuse me, let me just say, at that point, that is the constitutional test convincing clarity and that should be [563] changed to the very weight of the evidence, if you do not give the constitutional charges.

The Court: All right.

Mr. Stewart: I thought I could save time by interrupting.

Mr. Montgomery: And next, caused actual damage, that's not actual per se, the damages would be presumed in law.

The Court: This goes to the same thing where you argued his charge of presumed damages was incorrect.

Mr. Stewart: Yes, sir.

The Court: He says it is correct and therefore this is incorrect.

Mr. Stewart: Brown versus Miami Herald clearly holds, says, I've got it here, that was the case where they were proceeding for libel per se and the jury went back and they had introduced no actual evidence of damage. They were proceeding on a presumption of libel per se. The jury went back and they returned a verdict, I think it was 15, yes, $1500.

The Court: Yes, I remember, I read it. You have it in your memorandum.

[564] Mr. Stewart: Then you are familiar with it. The Court held there, there had to be proof, if there was anything more than nominal damages, they had to present evidence, actual proof upon which the jury could go back and bring something in. That's why that language is in there, have actual proof, that's the exact words of the case, actual damage to the plaintiff.

Mr. D'Aiuto: Again, that's where a retraction was made by the paper, within the statutes.

Mr. Frates: The retraction would go to the punitive, wouldn't go to the damages that we are talking about, the compensatory, so that basically——

The Court: You can't avoid compensatory damages by retraction.

Mr. Frates: That's right, but the basic principle is the same, that said was nominal damages.

The Court: All right. Number 14. I want to read that case again, that is in your memorandum, I believe, because I've read it once. All right. 14. Well, this is a standard jury instruction. That's all [565] right. And 15 is a standard jury instruction.

Mr. Stewart: Yes, sir. While we are at this point, let me just give you a copy of the Brown case.

The Court: Thank you. Now, this additional one, starting with number 16, do you have any comment?

Mr. Montgomery: Yes, sir. I object to this, it's inapplicable, it's not a proper statement of the law, substantially true, that's not the test, if the Court please.

The Court: I assume you mean from that, what you mean what the test would be if it is actually true you can't use the word substantially.

Mr. Montgomery: Yes, sir.

Mr. Stewart: In that case, the Cooper case, Your Honor, that was the case where they wrote an article and they said that a certain individual was shot in a certain bar, when in fact the guy had been shot in the street, down the street from the bar. And the Supreme Court, in that case, after reviewing what in fact had happened and what the article said upheld the truth defense.

[566] Now, it wasn't exactly true because they had the location wrong but it was substantially true and that is the reason why we have submitted this charge, that it does not have to be exactly in every material part exactly true.

The Court: All right. Anything else?

Mr. Montgomery: No, sir.

The Court: Let's get going then. Number 17.

Mr. Stewart: Let me say again at this point, Your Honor, 17, 18, and number 29, I don't know whether I have handed it to you, no, I haven't, that was the last one

we were having typed, here's number 29, Your Honor, right here. Number 17, 18 and 29 are on the qualified privilege.

Mr. Montgomery: Our objections have already been made, I don't see any reason for further arguments.

The Court: I think you have already made your objections on that. Mr. Montgomery, I believe you made——

Mr. Montgomery: Yes, but it's the completeness of the charge, even if you find qualified privilege, if you did find qualified [567] privilege, would this be a proper charge even under that.

The Court: All right. I'll make that that you questioned that even if you find that.

Mr. Montgomery: Yes. For all of them.

The Court: All right. Now we are at number 29. Is that right?

Mr. Stewart: Yes, sir.

Mr. Montgomery: We object to that, Your Honor, on the comment that has come in on the evidence is argumentative, very argumentative.

The Court: You want to respond to that, Mr. Stewart? He says it's argumentative, comment on evidence and argumentative, I believe he said both.

Mr. Stewart: We submit the charge.

The Court: All right. Number 20.

Mr. Montgomery: Not applicable, Your Honor, I'm familiar with the Layne versus Tribune and Hevey versus wire service case, that's not our case here. Those cases are distinguishable right on their face so I think number 20 would not be applicable.

The Court: What distinguishes them?

Mr. Montgomery: As I recall it's been sometime [568] since I have read those particular cases, but it was a mistake that came in through a wire service and then it was an element of proof.

As I recall, they proved either by affidavit, either by summary judgment or not, I just don't recall, but it was proof, not even motive that they took it off, that they had a right to rely on this wire service. I think it was AP or UP and this is not our case here at all. In other words, this is not a case where Time, Incorporated, took something out of AP, for instance, a wire service, and then printed it, that was false.

The Court: You mean reprinted it verbatim?

Mr. Montgomery: Right, because it was, you know, and made it, printed if they had printed what was in the AP wire we wouldn't be here. Do I make myself clear?

However, if the AP wire had had in there that she was guilty of adultery, then consequently that could be a defense, so it's an element of proof, if the Court please, and not applicable in this case.

[569] The Court: You want to comment on that, Mr. Stewart?

Mr. Stewart: Yes, sir. I can't put my finger on the AP thing here, but it's around here somewhere. The testimony in this case is that the original draft of the article was written from the AP and they also have the Daily News there, but from the AP, the AP says that he was granted a divorce and that he had accused her of adultery and extreme cruelty. It doesn't say he was granted a divorce only on grounds of extreme cruelty or that adultery was excluded in granting him the divorce.

The Court: Nor does it say that that was the grounds.

Mr. Stewart: It's a reasonable, it's the only inference that you can draw from this.

The Court: That's an argument.

Mr. Stewart: Yes, sir, but we have got to have the charge.

The Court: I think, well, Mr. Montgomery says it's a matter of proof; is that correct?

Mr. Montgomery: Yes. First, as a matter of proof. If they had taken, if the AP news [570] had said that today Mrs. Firestone was divorced by her husband on the grounds of adultery and it came through this well known source, but that's not what that AP wire says.

The Court: I undertsand.

Mr. Montgomery: It's a different case.

The Court: Number 21. That's a standard jury instruction, isn't it, or no, not exactly.

Mr. Montgomery: No, sir.

Mr. D'Aiuto: We have standard charges on that, Your Honor.

Mr. Montgomery: I believe we do have standard.

The Court: I am going to give it, it's the burden of proving damages rests on the plaintiff, of course, so I think I can take care of that. 22.

Mr. Montgomery: It's not standard, Your Honor, on damages.

Mr. Stewart: I think it's extremely necessary in a case of this nature.

The Court: Well, I am going to charge that they can only cover what's proved by the greater weight of the evidence, that proximately was a result of the—I'll give something [571] pretty similar to this if I don't give this one, it will be similar. You object.

Mr. D'Aiuto: Your Honor, I believe the standard, Florida standard jury charge covers the aspect that the plaintiff has the burden of proving.

The Court: I think that's probably true and chances are I'll give it from the standard jury instructions. I certainly will put in that the burden is on the plaintiff to prove the proximate results of the publication, certainly do that.

Mr. Montgomery: 24——

The Court: We are at 23 next.

Mr. Montgomery: Excuse me. It's not a standard jury instruction, Your Honor, and I can't be sure but I think it specifically, I don't know of any charge where the Court ever says, at least in this day and time, that the standard jury instruction, just because I charge you on damages, that doesn't mean anything.

The Court: Well, to start out now, the standard says first if you find that the defendant is not liable you are not to consider it, [572] you will not consider the matter of damages, but if you find they are under the charges I have given you, then, and then you go on about their burden of proof and so forth. I probably won't give this exactly like it is.

Now, we have number 24.

Mr. Montgomery: I will object to that, Your Honor. I don't think it needs argument.

The Court: I haven't read this one. Let me read it. This goes to damage, right?

Mr. Medina: No, sir, truth.

Mr. Stewart: No recovery if you find that the article as published——

The Court: Had no different effect, you mean effect on somebody?

Mr. Stewart: Yes, it should be effect on the reader.

Mr. Montgomery: We object to it, Your Honor, and we object to it under the Florida case which was cited in this New York versus—or Crane versus New York Telegram case pertaining to the fact of a charge as opposed to an indictment, and we think that, I mean, this is so obviously erroneous here, [573] so far as if it goes to truth. The truth must be as broad as the allegation, that is, if they charged her on the grounds of adultery, they have got to prove on the grounds of adultery, and they can't say, well, it's true if it said almost the same thing, because you can charge a person, you can call him a murderer, but to

say he's been indicted for murder or convicted of murder are entirely two different things and I think I have set that out in my memorandum so I won't argue.

Mr. Stewart: The only thing I want to bring to the Court's attention, in the McCormick case, which I have right here, the Court said, in defining what is and what is not a libel, that a workable test, in other words, they are setting up what the test is for libel, is whether the libel, as published, would have a different effect on the mind of the reader and that which pleads the truth as adduced would have in effect.

This is the opinion: "A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." This case, what they are saying [574] is that the only thing we should have published was, wherever the judgment is, the grounds of the counterclaim was granted.

Now, their position is if we published that then there would be no libel, obviously, and the only point I am making to Your Honor is that under the test of this McCormick case where they say this is a test for libel, if a person reading our article would react the same way as a person reading the divorce decree, then there is no libel, and that's what the test is.

Mr. Medina: May I add something to that, Your Honor?

The Court: Yes, sir.

Mr. Medina: Our 24 is in conflict with plaintiff's 15 dealing with truth. And their 15 is based on New York law, on which I think I am competent to speak. The New York law is identical with the McCormick case which Mr. Stewart has just quoted from, and I will give you two cases including Fleckenstein on Page 2 of the New York Court of Appeals, with precisely the same test in New

York as you have in Florida, on the workable test [575] as to whether they have the same test, and I say, Your Honor, that both New York and Florida sanction the test on truth.

Mr. Stewart: Here is the McCormick case.

Mr. Montgomery: If that be the case, Your Honor, if New York is that and Florida is not that way by reason of the fact that Florida cited in Crane versus New York Telegram Corporation, pertaining to the fact that if it is, if you are charged with an indictment that's entirely and absolutely different than being accused of it. Says a plea of truth is justification must be as broad as the alleged libel and must establish the truth of the precise charge made therein.

The Court: All right. Let's go on. Number 25.

Mr. Montgomery: I object to that, Your Honor, there would be no reference or mention of it, and I don't think there is going to be a charge on it. It's been mentioned in the trial at every opportune time.

The Court: I think the defendant has a right in arguing damages to say don't forget, the only thing they are claiming is so and so, they don't claim she lost money from [576] occupation, lost business or her reputation was hurt. I think they can argue that as much as they like.

I don't know that this is necessary in the charge because it appears he won't be making the claim. If he gets up and makes a claim, which he's not going to do, but I mean, this charge might be necessary if he turned around and asked the jury for it. If he asked the jury for it, this charge would be ncessary, of course. Of course you'd object and I would instruct them at that point to this effect. Obviously Mr. Montgomery is not going to do that because he'd certainly put himself in a very bad position before the jury.

Mr. Montgomery: You don't charge on things you don't want.

The Court: He can argue, you can argue, gentlemen, call that to their attention, the only thing they claim is mental anguish, or whatever I am going to charge, if I am going to charge anything. If I charge mental anguish only, then this is the only thing they claim. I am sure that's the only thing he claims.

[577] Mr. Montgomery: Your Honor, along those lines, right now to save objections and difficulties, I think the defendant should be forewarned not to speculate on any reason as to, or argue to the jury why the reputation was withdrawn or things of that nature.

The Court: I told him not to say it was ever claimed, not that it was withdrawn, that's been settled. You understand that?

Mr. Frates: We have never mentioned it other than there's no claim for it.

The Court: What he means, though, further, you both understand of course you are not going to mention it was once claimed. I have already ordered that was not, should not be mentioned. Further, he's going further and saying he doesn't think that you should be allowed to speculate why any claim is.

Mr. Frates: I am not going to speculate. I am just going to tell them, I am going to leave that up to you.

Mr. Montgomery: I would strongly urge that would be error and would not be arguing the evidence.

The Court: See, for instance, when he doesn't [578] claim something, what difference does it make?

Mr. Frates: I think you have an absolute right to comment on it, that she's talking about there is no claim for damage to her reputation.

The Court: You can remind them, tell them and be sure and remember that. You can always do that, certain elements of damage, don't forget, not claimed in this case. But then to say why aren't they claiming——

Mr. Frates: Certainly I think that's a fair inference, in argument to the jury, if there is no claim and you can draw inferences as to why there is no claim.

The Court: There is no claim, obviously, because they don't contend she lost any, they haven't damaged her reputation, so you see, what difference does it make.

Mr. Frates: I might say that in that way.

The Court: They don't claim that.

Mr. Frates: They are not claiming any and they are not claiming any because they don't think it will damage her reputation.

Mr. Montgomery: I am going to object and move [579] for a mistrial. It's not even in issue.

The Court: I don't think it's necessary because you're trying to convey to them, to the jury, that obviously her reputation was bad. That doesn't have anything to do with whether or not they are entitled to the damages.

Mr. Frates: Well, Judge, they are trying to leave the impression that her reputation is good and this nice girl should get—it would naturally flow.

The Court: Just a moment. If they keep saying, well now, this is such a nice person, if they ever mentioned she has a good reputation, why, I think they are in trouble then.

Mr. Frates: Your Honor, I think we will concede we haven't tried to inject that type of thing in the trial.

The Court: No.

Mr. Frates: We don't want to do it here, neither get in a donnybrook. But I think it's important to tell this jury there is no claim for reputation, because otherwise, if they found for it they would find for loss of reputation.

[580] The Court: If I were defending this case I would think it is important to emphasize and print on the jury there is no claim for reputation. But I am going to rule, and I am not going to say you gentlemen can understand why that isn't. You can appreciate the reasons, gentlemen

of the jury, why there isn't any claim, I don't think you are entitled to say.

Mr. Frates: Then the only comment I would make, remind them, one or two or several times, there was no claim for damage to her reputation.

The Court: Right, like loss of money.

Mr. Montgomery: If he does that, can we, if he emphasizes there has been no claim for damage to reputation, say why, in our opinion, legal opinion as to why we did not put it in?

The Court: I think if you say why, you are going to open it up. I would be very careful about that.

Mr. Montgomery: This is what I am getting at. I don't think it should be mentioned at all.

[581] The Court: If you can say why you didn't claim it, he can ask the jury to say, well, there's a reason why didn't you. I say you didn't claim it because of another reason.

Mr. Montgomery: Yes, sir, Your Honor. By reason of the fact that the reputation has been withdrawn in this particular case, there would be no reference to it, if we don't get up there and don't claim it, how can it be in rebuttal or anything of that nature so far as Mr. Frates is concerned to even mention it in the first place.

The Court: You are going to ask damages and I am going to let him remind them if he wishes. I think as a matter of reason, you can't get up and repeat and repeat. I will let him remind the jury, when he speaks on damages, he will say they claim certain damage and of course you try to show she didn't suffer that damage under the evidence here, and he can say and please remember there is no claim for pecuniary loss, or if you find for her and assess damages, don't forget there is no claim for pecuniary damage or loss for damage to reputation.

[582] Just like you can say, if a man gets up in a personal injury case, and doesn't claim permanent injuries, you might want to remind the jury of that in your defense. No comment about why or anything.

Mr. Montgomery: Your Honor, may I ask the Court, so far as Mr. Frates is concerned, you see the objections, maybe I am over sensitive, but as a trial lawyer I know about objections before the jury and what effect a lot of times it has. It just brings it on. And could I ask the Court, and I am very certain it will, but to keep in mind that if it is over emphasized, but we would expect and request the Court, in spontaneity of it to get the argument back on the proper line.

Mr. Frates: Of course, Your Honor, I assume, and I anticipate Mr. Montgomery is going to step over the line and I will have to make a couple and I am not going to throw that responsibility on Your Honor.

The Court: There are a lot of objections on argument. I don't know what's going to come up but there's two things that are usually not objectionable unless they are extreme, [583] all this a lot of lawyers object to. Now, if one side says a certain witness testified as to this and opposing lawyer remembers it absolutely different, that's no ground for him to get up and object. I might remember it a different way. So I don't expect objections unless there was any such witness, for instance, of an extreme like that. But if he says I remember this witness said so and so and it's just the opposite from what the other lawyer remembers, that's not grounds for objection.

If they misstate something, and then the Court is going to charge you and so and so. That's something you can clear up. Those things I don't think are grounds for objection.

Mr. Frates: Your Honor, I was being facetious, I don't anticipate objecting at all, no matter what he says, almost.

The Court: There is a latitude, and of course I expect counsel not to make personal reference to counsel.

Mr. Frates: That's right. And of course I think again, Your Honor, that they expect [584] to put on the rebuttal, I would hope that they would stick to the rebuttal.

The Court: If you feel, I think if at any time a defendant feels that what they are saying is not rebuttal but is something new, yes, I think you would be obligated to object, of course, and Mr. Montgomery will have that in mind because he's a defense lawyer.

Mr. Montgomery: Always.

The Court: And he knows of course if he brings up something new in his closing argument, of course that's objectionable.

25. I don't think I will give this charge but I think, Mr. Frates, as I said, you can remind the jury of this when you are discussing damages.

Mr. Montgomery: 26 is affirmative directed verdict, Your Honor.

The Court: Well, that would be, 26 would be a directed verdict. If I say this is the law I should grant your motion for a directed verdict right now, shouldn't I? Gentlemen, as a matter of law the final decree of divorce was granted on the grounds of adultery and extreme cruelty.

[585] Mr. Frates: Of course, Your Honor, at the inception of this thing, that was the way I felt because that's what I feel it exactly says.

The Court: So if I were to give this charge there would be no use to have anything more because they wouldn't have any case. If I say as a matter of law it was granted

on the grounds of adultery, you haven't certainly then committed any libel, have you?

Mr. Frates: No, Your Honor, but I feel that Your Honor feels this, or is of the opinion, and we are not, we submitted the charge, we are not presumptious enough to tell you, it reads that way, we think that charge should be given.

The Court: If I give this they can't under this charge find for the plaintiff. This is what you are arguing. If this is correct, and I am of this opinion, I should terminate this right now and grant your motion.

Mr. Frates: Yes, and I think you should.

The Court: I know you do and you have argued that but I don't think it would be a charge. If I let it go to the jury that would mean [586] I haven't held this to be a matter of law.

Mr. Frates: Your Honor, I think the matters have been sent to the jury on charges, where I thought they were tantamount to directed verdict, both ways.

The Court: 27. Am I not commenting on the evidence in this, 27?

Mr. D'Aiuto: We object to that, Your Honor, argumentative and a comment on the evidence.

The Court: This has been the argument of the defendant throughout, that that's a reasonable interpretation, but wouldn't I be commenting on the evidence? I doubt if I would give that one, gentlemen.

Mr. Frates: Again, Your Honor, we submitted that on the basis that this is a legal document and I think Your Honor can, as a matter of law, say that. I don't think that's commenting on the evidence. I think that's just like, as a matter of contract, I ruled as such and such in this contract and that's why we submitted it.

The Court: All right, sir.

Mr. Stewart: 28 we submit only in the event that we get into some of these other statutes [587] that they want.

The Court: Oh, yes, this was submitted because they have requested some statutes; is that right?

Mr. Stewart: Yes, sir.

Mr. D'Aiuto: Your Honor, I would still object to this because unless they've got some authority that the Court's finding in the Firestone case, and his ruling as to the reasons for his granting the divorce is not the law of the State of Florida, which is before the appellate courts right now, for their determination, then I fail to see where this charge should be given. There has been no such holding by the appellate courts that what Judge Knott granted that divorce on is not a ground in the State of Florida.

The Court: It just says that is not a ground, adultery is, this is not.

Mr. Stewart: That's Florida——

The Court: I think actually you people—I would probably have to give this if I gave that.

Mr. Stewart: This is a contingent charge only.

[588] The Court: Yes.

Mr. Stewart: 29 we have already covered, Your Honor, that went in connection with the other charges on the qualified privilege.

The Court: Yes, I think you covered that before, didn't you?

Mr. Stewart: Yes, sir.

The Court: All right. Yes. I'll have to get all my things together here, so in a minute we will recess and then I'll stay here and gather up these papers. Mr. Montgomery, do you feel—here's what I will do in the morning now.

You understand I'll have something written out, my rulings on the motions and the number plaintiff's so and so given, others denied; defendant's so and so given and

others denied. And of course I will announce these rulings, not the rulings on the charge, but the rulings on the motions I will announce in open Court. But I will give you those rulings, in there I will have it written.

If you will come at 9:00 o'clock and that will give you some time to look over [589] these things to decide how you are going to proceed. But remember it's my ruling that there will be no further arguments tomorrow morning or anything, regardless if you think of something, because I'd rather hear it now.

Mr. D'Aiuto: We have one additional damage request in view of the testimony. I was going to request the standard jury charge on aggravation of the preexisting mental condition or emotional condition, but the way the testimony has come in the case that there is evidence she had emotional distress and was upset prior to the time of the incident, that subsequent to it that she suffered an aggravation is about what it amounts to, so we would like to request that standard jury charge, appropriately deleting bodily injury and so forth, but a charge on aggravation of preexisting condition to be given as part of the damage instruction.

Mr. Frates: I guess you are hearing what you want to hear, but there's no, one, I don't know whether there's any evidence of any mental anguish. There's a couple of [590] comments, talking about them, but when you got back to it, maybe there is a thread there, but there is no evidence of any aggravation of a preexisting condition.

The Court: All right. Let me think it over.

Mr. D'Aiuto: Thank you.

Mr. Medina: I am still not clear as to how we are going to get on the record if you don't give our constitutional charges.

The Court: They will all be filed in the record herewith, I mean all your written, requested charges with my notations and initials are refused will be in the file.

Mr. Stewart: May I also suggest, when we come back in, right before we start to argue, that you read into the record that you granted this and denied that?

The Court: I have never done that. I don't think it's necessary.

Mr. Medina: Well, this case, if we should lose is one I would take to the Supreme Court. I know from experience there that unless you can point to the place in the record when you said it, it's most difficult to get it on the charges.

[591] The Court: It will be in two places, it will be in the record that the reporter writes up, the whole charge will be there, so obviously what's not in her record will be written, every charge you have in there will be granted or denied, filed by the clerk and the date stamped on it.

Mr. Medina: That will do it.

The Court: This is our regular way, I have always found that they don't have any trouble about bringing up these charges on appeal.

Mr. Frates: That's all right with me, Your Honor.

The Court: All right, gentlemen. Court will be in recess. I am going to stay here and gather these papers up.

Mr. Montgomery: Your Honor, about argument time.

The Court: Oh, I did start to ask you. Do you think you need that long?

Mr. Montgomery: An hour.

The Court: An hour sounds reasonable to me.

Mr. Montgomery: How about maybe an hour and fifteen mintes and I don't think we will take that long.

[592] The Court: You usually don't argue very long. I will give you an hour and fifteen minutes with the idea

you may not take that long and each of your associates or partners will keep your time.

Mr. Montgomery: I will handle the close, and as we have now, Mr. D'Aiuto will handle the rebuttal.

The Court: You are going to open?

Mr. Montgomery: Yes.

The Court: Court will be in recess until tomorrow morning.

(Thereupon, at 5:10 o'clock p.m., the Court was recessed until 9:30 o'clock a.m. the following morning.)

[593] CERTIFICATE

* * *

[596] BE IT REMEMBERED the following proceedings were had before the HONORABLE CULVER SMITH, one of the Judges of the above-styled Court, and a jury, duly empanelled and sworn, in the Palm Beach County Courthouse, in the City of West Palm Beach, County of Palm Beach, in the State of Florida, beginning at the hour of 9:30 o'clock a.m. on Thursday, July 16, 1970, with appearances as above-noted, to-wit:

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[597] The Court: Ladies and gentlemen, at this time counsel will make their closing arguments. Under the rule, the plaintiff has the opening and closing.

Mr. Montgomery.

Mr. Montgomery: May it please the Court. Ladies and gentlemen of the jury, first of all on behalf of Mrs. Firestone, Mr. D'Aiuto and myself, and I am certain counsel for the defense, we appreciate the time and interest in this particular case. It lasted for some time. You have been in and out. There has been a number of objections and I

think you have given this case during the time that you have sat here and listened to it the deliberation that it needed by reason of the fact that there is something even greater and more paramount in this particular case today and that is accuracy, truthfulness, good motives of magazines and news publishing companies.

We think that the evidence in this particular case, and that is the reason I am here before you, is to go over it just a [598] little bit to point out to you what was actually done to Mrs. Firestone in this particular case. The recklessness, the callousness, the utter disregard for the truth and the consequences, the other sheer consequences of this lie.

We take the position and have taken the position that Time, Inc., here dipped down in the subterranean darkness in order to sell a magazine, to make it slick, and did not comply with what knowledge they had and knew about. They sold, they sold at fifty cents a copy, three million five hundred ninety thousand eight hundred of this magazine. Their gross on this particular magazine for this one week was one million seven hundred ninety-five thousand four hundred dollars. Now you just think about that. And Mrs. Firestone receives forty-five thousand dollars a year. The money in this particular case, you can see by Mrs. Firestone, is not foremost in her mind. The forty-five thousand dollars a year, three thousand dollars a month, seven hundred fifty dollars a month for [599] child support, but what is important and why we are here is Time, Inc., why didn't they retract? Why didn't they say, "Excuse me"? Why are we in the Court right now? Why don't they admit their error? Because they think that this case is not in New York City and is not in Chicago or not in Los Angeles, but in Palm Beach County, Florida, and they think the people in this particular county will not rise to the occasion, and if they walk out of here with a verdict of two hundred fifty

thousand dollars or three hundred thousand dollars or something of that nature down, they walk out of here unscathed so far as profit is concerned. Unscathed. They made a profit. They made a profit. And that is what they are in business for.

Mr. Frates and counsel for Time, in choosing you for a jury said, "Understand about corporations, they are just people." Well, we introduced those people to you and let you see them and you will be charged under the law to evaluate for their interest in the case, the way, method and manner in [600] which they testified, the matters upon which they testified, in order to determine as to whether or not Time, Inc., was truthful in this particular matter.

Why the interest, just the interest on this one million seven hundred ninety-five thousand dollars profit, which multiplied by fifty-two weeks, gives them over ninety three million dollars, ninety three million dollars on this Time magazine. Are you going to allow them to walk away from here unscathed? I think not. Do you believe or can you believe in your minds and in your consciences and hearts that Mrs. Firestone would go through this trial, would have this before you if it wasn't important, would subject herself to the publicity which you will see after this particular trial, will put herself upon the stand, would allow herself to be cross examined by Mr. Frates, had he wished and she was placed on the witness stand for this reason. Here she is, Time, Inc., ask her questions, anything you want to. And what were those questions? "Mrs. Firestone, didn't the divorce upset [601] you?" Sure it upset her. Read that article in there. Do you know that in 1964 during the throes of this divorce this lady attempted suicide? Do you know that during this particular divorce she was declared mentally incompetent? It is in evidence, the Daily Herald—

Mr. Frates: Your Honor, I have listened to this and I have refrained——

The Court: I think he can comment upon the evidence. You can comment on it.

Mr. Montgomery: The mental and emotional upheaval on behalf of Mrs. Firestone has been shown to you by just a number of witnesses. We didn't parade everybody in this particular matter. I think we showed you through the selected testimony, and there are other persons that have been—the defendant has a right to call witnesses, all they want to, simply by subpoena if it hadn't been true. No retraction.

Now let's go to the evidence and the facts in this particular case. Before we do, I am going to read you a portion of this particular order and I am certain that [602] the defendant is not going to read to you, but you will have it. It is on Page 4 and this is an additional finding of the Court. "The minor child of the parties has been in the temporary custody of the plaintiff and the evidence demonstrates that she has shown affection for him and devoted time and attention to his care. The Court finds that the plaintiff is entitled to be awarded the custody of said minor child." The minor child, Mark Alan Firestone is a portion and part of this particular suit. His mother, by Time, Inc., published over three and a half million, was said to have been found guilty of adultery. That is a lie. It was never retracted. They never said, "Pardon me." They never said, "Excuse me." They never said anything. They put us in the Courtroom before a jury of six people like yourselves in order to make a determination as to what should be done in cases of this type. In 1967, a short time before the Christmas holidays, three days before Christmas, this article was published, but [603] there is a background to this particular article.

December the 15th in 1967, Defendant's Exhibit Number 6, Time, Inc., in New York City heard that the divorce was final between Mr. and Mrs. Firestone after an intermittent seventeen months of testimony, taken before Judge Knott. So Time sent this down to their Miami bureau and they asked several things. They said Milestones' scheduling the divorce granted to Russell A. Firestone, Jr., from wife, Mary Alice Firestone. Time, Inc., told Miami, "We are going to put this in the magazine", and then what else did they do? "Need the grounds on which it was granted. What, in the words of the Judge." "In the words of the Judge." Then it goes down here and this is marked out because they had lost the file, "When were they married? Need the birthdate of both parties as well as for their son. How much alimony, correct spelling, who got custody of the child? What is the correct spelling of his name?" Mark is in this. Mark is in this. [604] "Understand the Court hearings were quite something," and so forth. "Need usable quotes." "Need usable quotes." This is what they asked for from their own people down in Miami.

Now let's see what they got. Let's see what they got. On December the 16th, you heard the testimony cited, December 12th, it was a mistake, it was marked December 16th as received down here from Dick Delaney to Applegate. Who sent this down here? Applegate, whoever he or she is. The Judge ruled, "It is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication and that the marriage should be dissolved."

The Judge ruled. Do you know what Mrs. Nadasdy said? "Pass sentence." That is what it meant to the researcher up in New York City, "pass sentence." The Judge ruled. Needing interpretation of that, ladies of the jury,

so this is what they got when they sent this wire or telephone call, whatever it was. Now what happened? They [605] needed some more usable quotes. So here comes Mr. Delaney, the fall guy.

Where is Mr. Duncan? Where is Mr. Duncan? You got Nadasdy, you got Daniels, you got Doerner, you got nobody sitting over at that table representing Time, Inc. Where is Duncan? Where is Duncan? He still works for Time, I proved that. They flew all these people from New York City down here. Where is Duncan? Where is Duncan to tell you just what you are going to gather from the evidence right here?

So Delaney, they put Delaney on and what does he say? He says he talked with Mr. Farish and he quoted technical grounds. Technical grounds for divorce by Russell Firestone, and it is down here, and then he says, "The Judge, however," "the Judge, however, in quite a colorful opinion said that neither of them," the same thing that Duncan had told them, "had shown the least susceptibility to domestication and the marriage should be dissolved." They wrote that the Judge convicted Mrs. Firestone of adultery and that is a lie. That is what we [606] are here for. Good motive, truth.

Now let's go on up here. We propounded interrogatories under oath to the president, to the then president of Time, Inc., of this two hundred twenty-nine million one hundred two thousand dollar outfit. Now we asked him, "What were the sources of your information?" And what did he say? I will read you exactly Interrogatory Number 8, his sources were the Associated Press dispatch, the Miami Herald, Joseph D. Farish and James R. Knott. Well, you have the Associated Press dispatch. You will have the Associated Press dispatch because here it is right here, Defendant's Number 1. That is it. It does not say that Mrs. Firestone has been convicted of adultery.

And then what happens? Mr. Farish, by reason of the accusations of who, Delaney, the fellow out to get usable quotes, who again told him in the words of the Judge what the grounds for the divorce were, he says, "Well, I talked to Farish and Farish told me." Mr. Farish, just about a month [607] ago, had to withdraw from this case in order to testify. Did he testify truthfully? Was he truthful to you? You saw him on the witness stand. Well, judge his testimony by this.

What did Delaney say about Judge Knott? "I called Judge Knott in the afternoon." Never any supplemental, never any supplemental things going to New York, "and I checked the wording of the decree with the Judge." And what did Judge Knott say, "I didn't even have it at home on Saturday, December the 16th. Didn't even have it with me."

"Did you ever tell anybody, not just newsmen?" Mr. Frates asked him, "Did you ever tell anybody," that is anybody, anyone, "that you found Mrs. Firestone guilty of adultery?" "No." The most resounding, the loudest answer in this particular Courtroom. No. No.

What happened in New York City? Well, the file was lost. Where was it? It was in the legal department and this twenty-four or twenty-five year old lady up there, [608] Miss Nadasdy, had to go down there to that legal department and get it. Why was it down there? Because Life, another Time, Inc., magazine, had published another libel during this particular divorce suit on May the 20th of 1966. So here it was. When Nadasdy saw it, "Oh, suing Time, Inc., huh?" When Daniels saw it, "Oh, suing Time, Inc., huh?" When Doerner saw it, "Oh, suing Time, Inc., huh?" Had to get it from the legal department. They had a legal department right there. Did the legal department ever even look at this particular part? Did the same

lawyers down here who are representing Life magazine and Mrs. Firestone's claim against them, were they ever called upon right across the street in the Concord Building from Room 244 in the Courthouse where Time, Inc., has its office presently? Did anybody ever ask? No. So then what happened? They wrote down there, Duncan replied. Delaney was a stringer, and another thing, when the president of Time, Inc., filed these sworn—you know when [609] you swear before God, "I will tell the truth," that is what interrogatories are, when you are down there and you swear to them. Did Mr. Linen, who was the president, ever even talk to Mrs. Nadasdy? Did he ever talk to Daniels? Did he ever talk to Doerner? Did he ever talk to anybody when he swore before God that those answers to those interrogatories were true? You heard the testimony. He did not. Then what happened? She got this so far as—before I get to that let's talk about Delaney.

Delaney, when I put him on the stand on September 3rd, 1968, this suit was filed in April of 1968, swore to an affidavit and said my file reflects so and so and so and so. Where are his files? "I destroyed them." "Destroyed them in light of the fact that you knew that Time, Inc. was going to have Mrs. Firestone in this Courtroom?" "Where are they?" And what about this file business? This is a New York Daily Herald, we depended upon that, too. That is not what the president said under oath back in [610] October of 1968.

They come up at the last minute with things of this nature and these are things you are to consider as far as the punitive damages in this case are concerned. Punitive damages, punitive damages are designed for a jury for people to tell corporations and who all like NBC, CBS, any magazine, any news media, don't do this anymore. When you report, you report accurately. When you report, you have good motives. You have to take people into consideration when you write something for three and a half million people. So Mrs. Nadasdy gets it. Let's go. The legal department, the source for the New York Herald, she says; that is not what the president said. She had the quotes of the Judge, she told you what they meant and they had a deadline. So they give it over to Mr. Doerner and what does Mr. Doerner say? He is the one that wrote the first draft of the article. "We never rely on newspapers. We rely on our own people in Miami." If he relied on his own people in Miami, the Judge [611] ruled, said Duncan, said Delaney, however the Judge said, even with the comma, even with the comma there, and they swear they don't have an order and didn't have the order before them, and I submit to you that they did. Look at that quote in there. Even the periods and the commas are exactly from that particular quote. Then what occurred? The article came out. First and foremost in her mind and look at that Miami article. Mr. Frates asked, "Are you Mrs. Firestone? Were you upset with the article?" "Yes, I was." "Were you upset over the divorce?" "Yes, I was," but look at that Miami Herald article. And it gives a quote right after the divorce decree was entered and it says, "There is one thing I am happy about and the most important thing is that I have got Mark," and you could give her a dollar for every tear and every sleepless night and justice still wouldn't be done. All they had to do was retract in the next issue, the 29th. It comes out every week. Why don't they? Because that would tell their subscribers [612] and their readers "We sometimes make mistakes." They don't want that. They don't want that. They won't do it. Some of you readers of Time, have you ever seen a retraction? Have you ever seen one?

We have two people on this jury that read this particular article here. Because they want you to believe and the

readers to believe that everything in it is true and absolute and without question.

So Mr. Farish wrote and asked them, and the letters are here, this is wrong, retract it. They didn't even bother to pick up the letter. Unclaimed. Didn't even bother to pick up the letter and it came back unclaimed, so he wrote another one just like it on January the 16th of 1968. In January, February and in March, nothing. Nothing. What do you think about a corporation like that? What do you think about people like that? Look in there, they have got sections on the law and in that particular section on the law they talk about libel and in that very same magazine. They know what the law is, but they want to [613] walk away here unscathed, unscathed, and only your verdict, only your verdict will act as a retraction.

Time did something in one terrible, savage, savage, without any charity, that Russell Firestone with all of his millions and his family's millions failed to do in seventeen months, and that is to convict Mrs. Firestone of adultery, to one of every fifty families of this United States and abroad. They did it. They did it and they sit on that stand and say, "Yes, I believed it and I still believe it." My gosh, you know children are cruel, everyone of you have children, see them grow up. They are cruel, they talk, they know they hear their families talk. They don't know anything about it. And that is what Mrs. Firestone said to you. "Because I know that one day Mark will know what this is all about." Give her a retraction. Make your verdict, give her the same space, the three and a half million people of this country, that Time did. That is the only way. That is the only way. That is the [614] only vindication in this particular matter. That is the only vindication.

This terrible ordeal, and it is for families and for mothers and for people, is over at this point. I have submitted and I have given you the matters that I think are necessary and

important. I ask you to look at them and let you render your verdict. Was Mrs. Firestone convicted of adultery? Will Milestones have another article in there about Mrs. Firestone and about this case, suing for adultery? What was the verdict? And how are you going to prevent this from happening again? How are you going to give your minds and hearts and consciences that this will never happen again? They just won't do it. All they had to do is retract and apologize. What does that mean? "Sorry, we made a mistake."

Daniels, you saw him. Interrogatories, you saw them. You heard them. If you can come back with your verdict after your deliberations and be able to look everyone in the eye without any apologies to anybody, you have done your duty. There is more [615] here than Mrs. Russell Firestone.

You have been chosen to do a job, you have a duty far, far above many people who are called. If I have done anything to offend you in this trial, I apologize. I ask you to do justice and see that truth prevails. Verdict, verus dicto is the Latin word. Truth. Truth. Thank you.

[616] Mr. Frates: May it please the Court, ladies and gentlemen of the jury, the longer I practice law representing all spectrums from people who have absolutely nothing to people who are as important in this country as Time magazine, every day I get more appreciation from the fairness and the accuracy of this system and I don't think you are going to try this case, I know you are not going to try this case because we have some people from New York or Time magazine. You are going to try this case on the facts and the evidence just as you said you would, and juries do that.

Mr. Montgomery, and he is entitled to, made a very emotional argument and I didn't keep exact time, but most of the time it was on conclusions that he had drawn as an attorney, not on the facts and the evidence in the case. I

want to talk about the facts and the evidence in the case and the law. Each one of you recall when we picked you, and I don't think it is necessary to ask you to reaffirm, you said you would require the plaintiff to prove his case by the greater [617] weight of evidence, both as to damages and as to the liability.

There are two issues. First, I'd like to talk about the damages because I think it is part and parcel of this law suit and then talk about the liability. And this is our responsibility, to try to help you arrive at a fair verdict in this case. So the fact that I talk about them certainly doesn't mean that I think she is entitled to them. I have a firm conviction that she isn't, but it doesn't make any difference what I think. What the law and the evidence and what you people collectively think is right in this case under the law and the evidence, and I think that you folks, I hope you will agree with me that I—when I say I, I am talking about Mr. Medina, Mr. Stewart, have tried to be as fair as we can in this trial to Mrs. Firestone. I probably, as counsel said, could have interrogated her for hours. That is not the issue in this case and I wouldn't want to do it. And I am sorry that I have to make some of the comments that I am going to have to make, [618] but unfortunately we were sued and brought in here so I am sure you will understand.

The Milestones article was published, the law suit was brought by Mr. Joseph Farish who represented her in a divorce action and in this case. Let's talk about what is not claimed for damages by Mrs. Firestone as a result of this article. What they are complaining about are the words in this article "on grounds of extreme cruelty and adultery," and they filed the suit. When you go back in that jury room, if you get to the damages, and I am talking about this because I feel it is my duty as I said to discuss damages, will you please remember Mrs. Firestone is not claiming

any injury to her reputation as a result of this article. Mrs. Firestone is not claiming any damage or any embarrassment, damage to any business or earning capacity or any embarrassment or any humiliation, and yet that is what counsel was just arguing. That is lawyer's talk, and you all agreed you are not going to try this case on the lawyer's talk. It is easy, [619] a lawyer can get up and make an emotional—but that is the law and the evidence in this case. No claim as a result of that article to injury to reputation, no embarrassment, no humiliation, no business loss in any sense of the word.

So it leaves what? One item, mental anguish to herself, just to herself, not what other people think, because that is reputation. Now let's examine that in context with the evidence. They brought in Doctor Griffin, who is the Baptist preacher. Sure, a very fine young man who didn't know her very well. Moody, the regular pastor, was away. Talked about she made some comment to him about the article and then we asked him, "Doctor Griffin, Mrs. Firestone has had a lot of problems, hasn't she?" And he said, "Yes, a lot of problems." "Can you tell this jury or separate what her other problems are," and folks, we certainly haven't tried to spread that out in this trial and we intentionally didn't try to, but a lot of other problems and can you separate them? No.

[620] Then they brought in Doctor Murphy, who was the doctor, occasional next-door neighbor, but really an entirely different person, an older man and as he said, "I casually knew her." He said on one occasion he gave her some sedatives and I said, "Doctor, her doctors would know her physical problems, what mental anguish she personally has suffered as a result of this, wouldn't they?" "Oh, yes. Yes, they would."

So, folks, one of the great things about this system is common sense of jurors. Bearing in mind that they must

prove by the greater weight of evidence these damages. Mrs. Firestone said prior to this, "I was being treated by Doctor Cooney and Doctor Sory," and I said, "I don't want to know their names. She was under medical attention prior to this by two doctors and they didn't bring any evidence from those doctors. Now let's just apply our common sense to that. Who would you bring in? Who would you bring in? You would bring your doctors, wouldn't you? That is what Doctor Murphy said. And I submit to you [621] that there isn't any evidence that she has had any mental anguish about this. Certainly not from testimony from the stand.

She brings Mrs. Blicher, I think that is the correct pronunciation, who is the nurse, whose husband was the dentist. Mrs. Firestone was a patient who really wasn't a friend, was she? To me I thought it strange they didn't bring in any of her friends to testify. None of her friends. She brought in Sergeant Casey who had gone to school with her and occasionally saw her. What did Sergeant Casey say? "Yes, she mentioned it right after it came out, but never once mentioned the divorce case." But again applying your common everyday experience, if you really had suffered some mental anguish personally—again remember, please, she is not complaining of any damage to reputation. Wouldn't you bring your close friends in to tell the jury and not just casual acquaintances?

Let's, if we may, go back to the liability. Lawyer talk is not evidence. [622] Lawyer talk doesn't make any conflict. His Honor is going to instruct you, and I think several of you have said that you have served on juries before and you know after we get finished, His Honor will read you some law and tell you this is the law you are to apply to this case. And he is going to tell you that they must prove that there was a defamatory article that wasn't true and that it did some damage to her, was the legal

cause of her damage. He is going to tell you that if another article with the same context was there, even if you think it was defamatory, and Time is legally responsible, that there is still no damages, no liability, the burden is on them. Anybody can sue you, as we brought out.

Now how did all this start? It started with seventeen months of what has been described as scandal-ridden testimony right here in Palm Beach County, and again I'm sorry I have to inject that. And Judge Knott, who came in here and testified only that he did not tell Delaney something and he doesn't recall discussing the grounds. [623] Delaney asked him some checks and quotes with him and the Judge said, "Yes, I think those are reasonably accurate." That is exactly what Delaney said. Exactly what Delaney said.

Now, folks, I don't want you to be lawyers, but let's look at this final judgment just for a minute because where did the term, "grounds of extreme cruelty and adultery" which are in the article, where do we first see it? Right here in the final judgment. "Grounds of extreme cruelty and adultery." Right there. In the same quote. Judge Knott, and that was, as you have heard maybe too many times, was Mr. Firestone's counterclaim for divorce and she was just trying to get separate maintenance, which means he is legally responsible to pay her money for her maintenance, but no divorce. And His Honor sets that out and says what the grounds of the counterclaim were and this is Judge Knott and I submit to you folks, and again I don't want to make lawyers out of you. It is so clear it just says, [624] "Defendant husband's answer and counterclaim for divorce on the grounds of extreme cruelty and adultery." Now there is a lot of comment in here and then we come back to "Ordered and adjudged as follows." This is ordered and adjudged. We are on the back page. He talks about it. Sure, he puts in there neither

one of them were domesticated and it should be dissolved, and it is obvious it should have been from reading this.

It is ordered and adjudged as follows. This is why the Judge is saying, "Okay, I have said this, now here is what I am going to adjudicate. The equities in this cause are with the defendant. The defendant's counterclaim divorce being the same, is hereby granted", and we come right back again, Judge Knott wrote this. Not Time magazine. Counterclaim for divorce on the grounds of extreme cruelty and adultery. Judge Knott says it is granted, Russell Firestone's counterclaim is granted.

Now, ladies and gentlemen, I am reading from this document and I can't be more sincere than saying that I —this must be [625] very distasteful to the people who were involved in this litigation. And I say that if this decree had come out on anybody you would be distraught, you would be upset, and certainly if you were the wife trying to get a counterclaim and this happened to you, you would be distraught and upset. Counsel says there wasn't any statement made about adultery. And again, going to what Judge Knott says, not what Time magazine said, what Judge Knott said in this, according to certain testimony on behalf of the defendant, this is Russell Firestone and the counterclaim, extramarital escapades of the plaintiff, Mrs. Firestone, and I am using the word Mrs. Firestone, but that is the plaintiff, "were bizarre and of amatory nature which would have made Doctor Freud's hair curl." He says that is what he heard from the evidence. He didn't believe all of it. He didn't accept all of it, but he put that in there. He put that in there. And I would concede that would upset you. That would make you distraught. Other testimony goes on in [626] plaintiff's behalf, "would indicate that the defendant was guilty of bounding from one bed partner to another. The Court

is inclined to discount much of this testimony as unreliable." He is talking about her bizarre behavior and Russell Firestone's behavior. He is inclined to discount much of this testimony. He doesn't say all of it, does he? Did he discount fifty percent, twenty-five percent? I don't know, but isn't it fair from reading that to say that the Judge came to the conclusion just as what he said, that her actions were bizarre enough to make Doctor Freud's hair curl.

Then that went out, and then from West Palm Beach the Associated Press, the evidence has been here that this was covered by the press from all over the country, the Russell Firestone and Mary Alice Firestone divorce. It was a matter that everybody was interested in. The Associated Press, not Time, on the 15th when this came out, "Millionaire industrial heir Russell A. Firestone was granted a divorce. Russell Firestone was granted a divorce Friday from [627] his third wife, the former West Palm Beach school teacher he had accussed of adultery and extreme cruelty." What does that say? Russell Firestone had accused his wife of extreme cruelty and adultery and the Judge granted his divorce. Isn't that a fair interpretation of this? And this went all over the world. Everywhere they speak English. Everywhere they sell tires. This is a matter of interest to people. Have they complained about this? Not one word. Not one word. And this is what we have in front of us. Accused, the very two words, adultery and extreme cruelty, and the Judge granted Russell Firestone a divorce.

Well, I don't want to be facetious, but did this have any effect on her? No, because that is a fair interpretation of what happened.

Then he goes on and sets out some of the other things. The decree ended a stormy, scandal-ridden divorce battle.

Some of the same quotes in that. That came into Time and they had that in their file. And then they had the New York Times—I mean [628] everybody is calling this thing something else, including Mr. Montgomery. He called it the New York Herald. We have called it the Miami Herald. It is the New York Daily News and we offered it in evidence and it is, this article, which all these people who have testified here identified as the picture, the large picture of Mary Alice.

Now, folks, Linen said Miami Herald. It wasn't the Miami Herald. The Miami Herald was down here. The News, this is the article and this is the people who wrote the story and who worked on it and this is what they said and this has been in the official file attached to their affidavits. This picture attached to the affidavits of Daniels, Doerner, Nadasdy, has been in here for a year until there is no question about what picture we are talking about. We are talking about this item and it was in their file and what does it say? It goes on through some of the language, this was a very colorful opinion. This was an unusual opinion. And this is West Palm Beach, [629] Florida, special. They had a special—the New York News had a special reporter down here or had it sent special, not AP, a special one covering this trial over the period of time that elapsed. Stormy, scandal-ridden divorce trial of millionaire Russell Firestone ended today when the rubber and oil heir was granted a divorce from his third wife, statuesque one-time West Palm Beach school teacher, who had been accused of adultery. If you read this, what would be a fair interpretation of that? Did he accuse her of adultery? That was the ground, you have to have a ground. The Judge heard the testimony, and the scandal-ridden divorce case, and awarded the divorce to the husband.

Now, folks, these aren't pleasant facts necessarily, but that is what has happened. These were the two documents

that Time, Inc., had. And were they satisfied to run a Milestone as Mr. Daniels said, Mr. Doerner, Milestones is what important people do. Their births, their deaths, things they would be interested in. Did they [630] take these two and write them? No, they weren't satisfied because it said accused. I think a fair inference is that he found them guilty of both adultery and extreme cruelty. I don't think anybody would read them any other way. Certainly no lay person. What did they do? They weren't satisfied with that. Mr. Daniels determined this was a Milestone item, the senior editor, and he puts it in process. And then they start their team, I call it a team. I don't know if you are impressed but I am impressed with the way they investigate, the work they do to get several lines, and I think it is a team, and we don't want to get philosophical, but it is true, it is a team of which they built up in that magazine of journalistic integrity. Just because it was big—Time magazine started and developed into what it is today, and how did they do that? They did it through the kind of reporting and journalistic integrity that they showed in this case. So they call their Miami bureau. Let's not just take this, let's find out [631] more about this, let's investigate fully before we publish. This is the way Time does it. This is a higher standard than the AP, than the New York News, and I am not trying to—I am just saying this is physically what they did.

And they came back to Duncan, who got Delaney who used to live here and knew Judge Knott, and knew Joe Farish. And what did Mr. Delaney do? Mr. Delaney called the Judge at least three times. Is that attempting to really find out what the facts are? Called the Judge. We practice law and I would be a little apprehensive about calling the Judge on Saturday, but he calls him personally and leaves a message with his neighbor to have him call back. Didn't say, "Well, I can't get him." Went to the trouble of—well,

I think he said he knew a neighbor, called him, said have the Judge call me back, I want to check this, the New York office wants to be accurate. Yes, she asked, "In the words of the Judge." So he wasn't there and then who did he call? He called Joseph Farish, [632] Jr., who until a few days ago was the lawyer and represents Mrs. Firestone in several matters that have been brought out here, and talked with him about it. They called him and asked him some questions. And then as you recall I walked back there and I said, "Mr. Farish, you knew Bob Delaney, didn't you?" "Yes." "You were talking about the case, weren't you?" "Yes." And then I said, "Mr. Delaney asked you, or it was discussed, technical grounds, wasn't it?" And then he turned and he says, "Well, we have discussed this before", and here is what he said. I had the reporter write it up so I wouldn't misquote it, "But it is possible that the technical grounds as alleged in the complaint were adultery and extreme cruelty." That is what he said, "It is possible that I told Delaney that, the technical grounds for divorce." The complaints were adultery and extreme cruelty, after Delaney had asked him what were the grounds.

Now, folks, in careful reporting, I [633] have a difficult time, I can't imagine any more care than a person can take than to call the attorney of the person involved, and Mr. Delaney said were the technical grounds extreme cruelty and adultery, and he says yes. Now that is exactly what happened, and again, where did those words come from? The complaint, but isn't it strange they are in the final judgment? Counterclaim on grounds of extreme cruelty and adultery, and go back and bear with me because to me this is so clear. The defendant's counterclaim for divorce being hereby granted.

Incidentally, Mr. Montgomery talks about back in here, said they weren't domesticated and should be dissolved. But here is where the order is. Ordered and adjudged.

Heretofore existed between the parties are hereby forever dissolved. This is quoting the Judge. That is what he said there. So, folks, how can there be any dispute on that? And they sent that in and there were exchanges back and forth, back and forth. Get more information, find out [634] more facts. Well, isn't it an indication that they were going way, way beyond what they had to do or could do? And this is again the question of their journalistic integrity.

We talk about Time magazine. Who is Time magazine? What is any corporation? It is the people involved and you saw Daniels and Doerner and Miss Nadasdy. They impressed me. Maybe I am impressed easily, but they impressed me. Senior editor of Time, one of the seniors, there are several editors, but one of the top men. Daniels, you saw him. Yes, we believed it was true. This was a complete investigation, we felt it was accurate. We felt it was true. We still believe it is true. And Mr. Doerner, they had some—Mr. Montgomery talks about the question of doubt. There is no question that Judge Knott, in his order said much of this jumping from bed to bed and bizaare activity, he didn't accept much of it, but again, he sure accepted some of it, didn't he? Obviously, or he wouldn't have put in it [635] there.

Now we come down, and I meant to take this up on the damages, but he talked about punitive damages. His Honor will charge you that you have got to show that Time acted with malice. Is there any evidence in this case from this witness stand? Absolutely none. A lot of talk about it by the lawyer, but that is not evidence, is it? No malice. These people were going beyond their job as writers and researchers and they did what they thought was a job and compatible with the standards of Time and it really is that simple. This is a case where on the facts there isn't any liability on Time under the law. And if there was any

damages, what damages have they established? None. Coming in and telling you that the important thing was this article and upsetting her where just a few days before she had lost the divorce case. Her husband had won the divorce case. And where the evidence shows they have appealed it. Mrs. Firestone has appealed this decree to a higher Court.

[636] I have got notes and you always think of other things that you could say. You have been very attentive to the evidence in this case and I know you are going to be attentive to the law that His Honor is going to charge you. One of the things that I briefly touched on, that if you think in the context that this is reasonably accurate, then it is true. We say that this is compatible with the journalistic integrity of the three people involved, Daniels—the four people, Daniels, Doerner, Nadasdy and Delaney. What more could they have done? They didn't have the decree. Neither the AP nor neither did anybody else. That was to be published Saturday. I am amazed at the resources, the time, the trouble they went to in writing these few lines, which under the evidence in this case are true and accurate. They were true then and they are true now. And I have every confidence, I don't want to be presumptuous and tell you what you people should do, but I have every confidence that your verdict is going to say, as Mr. Montgomery said, what the truth is is the truth. This article [637] didn't make one bit of difference to Mrs. Firestone, and this article is true, and it is that simple.

Thank you very much.

The Court: I think maybe we might take a few minutes' recess.

Ladies and gentlemen, we will take about a fifteen minute recess and then you will have the last argument.

(Thereupon, a short recess was taken.)

[638] The Court: Mr. Montgomery, you used only a little over twenty-five minutes, I believe.

Mr. Montgomery: Thank you, sir.

The Court: All right. Are you going to make the closing argument?

Mr. D'Aiuto: Yes, Your Honor.

The Court: All right. Call the jury, please.

(Thereupon, the jury returned to the Courtroom after the recess, and the following proceedings were had in their presence and hearing, to-wit:)

The Court: Have a seat, please. All right, sir.

Mr. D'Aiuto: May it please the Court, ladies and gentlemen of the jury, this is my first and only opportunity to address you directly during this case. My function as you realize was to present the evidence on the first day of this trial. This is rebuttal, which means that we, as attorneys for Mrs. Firestone, have the opportunity to rebut what Mr. Frates argued in his final argument.

Let me say this, ladies and gentlemen, [639] Mr. Frates indicated that Time was not satisfied with just what the AP supplied to it and they were not satisfied with what the Miami Herald may have printed and they were not satisfied with what the Daily News printed. What they printed was that Mr. Firestone had accused, accused her of adultery. They accurately, fairly and impartially printed what the pleadings showed. Time magazine is playing a game with our minds and if you do not believe it, then take a look at how they have presented this case. They re-accused and twisted into conviction. They read a portion of Joe Farish's testimony as having been that, "I gave him the technical grounds for the divorce", and they omit the pertinent portions of his answer. The question by Mr. Frates, "Isn't it true, Mr. Farish, that the term

technical ground was used in your conversation with him?" "I was asked that question previously, counsel, as you are aware. I am not quite sure whether I or he used those words. Those words, but it is possible that the [640] technical grounds for the divorce as alleged in the complaint were adultery and extreme cruelty, but I did not tell him that the divorce was granted on adultery."

When you read fairly and accurately the literal, the literal, testimony of the witnesses, and when you fairly and accurately report proceedings that occur in judicial proceedings, then the defendant is entitled to a qualified verdict and His Honor is going to charge you on that. His Honor is going to charge you on their defense. They have two defenses, they say truth and they still believe it to this day, they say. The Time party, the Time party, as they registered at the Heart of Palm Beach, calls itself the Time party, all testified that they still believe it to this day, that she was convicted of adultery. His Honor is going to charge you, if you find that that was false, that knocks down one of their defenses. Truth with good motive actually, but we won't even talk about motive, truth. Conditional privilege has to be fair and impartial, he is going [641] to charge you and he is going to tell you it has to be accurate in its material matters and, three, reported literally, which means verbatim and completely reported, literally and completely, or a condensed summary, but fair and accurate. Fair and accurate.

Mr. Frates indicated that Time was fair and accurate in the way they printed this article. It was as fair and accurate as the statement that I just read to you, that he attributed to Mr. Farish. Playing a game with our minds.

Take the final judgment itself. Are we such fools in Palm Beach County that we don't know that what you charge you have to prove and then a finding is made? Gentlemen, ladies and gentlemen of this jury, you are going

to make a finding in this case. When the Judge sits as a Judge without a jury, he makes a finding of fact and he applies the law to it. You ladies and gentlemen of the jury are going to be charged by the Judge that you find your finding of fact and then you apply the law [642] that His Honor gives. That is the only difference between having a jury trial and a trial by a Judge.

See, we charged them with something. We have to prove it. Anybody, like Mr. Frates says, anybody can come in and charge anybody about anything. His firm, on behalf of Russell Firestone, charged Mrs. Firestone with adultery and they didn't win. Why is Mrs. Firestone appealing? She was not seeking a divorce. He was not seeking a divorce. Why was a divorce granted to Russell Firestone? Because he was the only one seeking a divorce because the Court found, on the top of the page, "Nevertheless it is the conclusion and finding of the Court that neither party is domesticated." Within what meaning? Within the meaning of the term as used by the Supreme Court of Florida." In citing the Supreme Court of Florida, and they cite two cases from the Supreme Court of Florida which give other grounds. For a lack of domestication.

Are we playing a game with our minds when we try to say that we did not—this [643] is Time I am talking about—Time did not have access to the final judgment? When you go back into the jury room, ladies and gentlemen, you compare, you compare the two dispatches sent, one at eleven twenty-five on Saturday, December 16, 1967, from Duncan, Duncan, the head of the Miami Bureau, the Caribbean region or whatever they call it. Using the quotes in response to the request for usable quotes and in that it says in reply, give us the grounds in the words of the Judge. The quote, the Judge ruled. What did Miss Nadasdy say? What does the Judge's rule mean to you? It means he passed sentence. He passed sentence, and that is exactly

what she said. Where did they get those usable quotes? Mr. Farish was at home on Saturday, called up between twelve and one o'clock. He testified he did not carry home a copy of the final judgment. Just like Judge Knott didn't carry home a copy of the final judgment to his home. Do you think we lawyers carry our judgments around with us to our homes when we have offices? Mr. Farish received a [644] judgment on Friday afternoon. Mr. Firestone's attorneys have their office directly across from Mr. Delaney's office at the Miami bureau in Miami, Florida, and how do you get quotes directly? Direct quotes to the comma, to the comma as printed in their dispatches of eleven twenty-five and at one twenty-five, p.m. How do you get everything to the comma? There is only one comma missing in the second one. This one is exactly including the commas from the Judge's ruling. This one Mr. Delaney apparently, that careful, accurate reporter, left out the comma, but everything else in here—there should have been a comma in there, and that the marriage should be dissolved. This one here has the comma after "domesticated." You check the exact wording of the final judgment. It is on the top of the second page, quoted verbatim.

How about these things down here? Judge Knott said, "and should not be allowed to hop from wife to wife leaving a child here and there along the way." Check the final judgment. Quoted verbatim, to the [645] commas, the periods and everything. The only thing inserted was his reportorial right to go ahead and put in she, parentheses, Mary Alice, which means this is not in the direct quote as all reporters know. They did not have access to the final judgment on Saturday when these two dispatches were sent up to Time magazine? They did not have access to professional advice with respect to what the wife is entitled to under Florida law? With respect to alimony?

Mr. Frates: Excuse me, counsel. I'm sorry, but three occasions now. Do you want me to wait until he finishes and then make the objection?

The Court: Without going into it any further, then if you have something——

Mr. D'Aiuto: The only law I am going to refer to is the final judgment, which is in evidence.

Mr. Frates: Now if Your Honor please, he has transcended your order.

The Court: Anything that is written in the final judgment you may of course refer to.

Mr. D'Aiuto: Thank you, Your Honor.

The Court: Of course, any citation there can be [646] read to the jury because it is in there.

Mr. D'Aiuto: The Supreme Court decisions are in here, you can read them. The findings of the Judge. He makes a number of findings in here. Findings and conclusions, neither party is domesticated, reported two dispatches to Time, Inc., on December the 16th, the day of the deadline. The finding that the minor child of the parties, that the wife was entitled to his permanent care and custody of that child, and other findings for and against the plaintiff and her ex-husband, Russell Firestone, and then we get what Mr. Frates would have you do, would read the accusations, omit the firm's seventeen month attempt to convict her of something she has never been convicted of, omit it completely, ladies and gentlemen, because why? Because there were some words in the Judge's decree about, if the defendant's testimony were believed and he has talked about hair curling. One time he even called it his head's curling, if you recall his questions. He quoted that so many times, he said all those [647] things, how could anyone reading this not interpret it?

This is what the Time people, this is what the Time people said; Mr. Daniels, the senior editor setting there in

the Courtroom, remember what his testimony was, ladies and gentlemen? As to how did you arrive at the conclusion that she was convicted of adultery, and he said, "I had these things," he was sitting here, "I had these things before me," and he named the AP, the dispatches of these Time correspondents and this article which pops up. Did President Linen know about this article? And by inference, by inference, he drew the conclusion that she had been convicted of adultery.

What did Miss Nadasdy say about how she drew her conclusions? "I presumed. I presumed she had been convicted because she had been accused." There is many a slip between the cup and the lip, between accusing and convicting.

Mr. Frates says, why was it Mrs. Firestone was upset about the articles that [648] said Russell had accused her of adultery. She wasn't upset because she was found not guilty. But Time magazine did, as Mr. Montgomery indicated, in one little article under Milestones, published throughout the free world and maybe even in Red China and Russia, according to Mr. Frates, published that she was convicted of something that she had been accused of. The scarlet letter A. Does that mean anything to a woman? Does it mean anything to a woman's child? Do you really believe that she had no damages, no mental anguish?

We have tried to keep emotion out of this trial and I apologize for my client's breaking down two times. We have had her leave and didn't even bring her in the second day because she is so emotionally involved in this case.

You read their exhibit. I want you to read about whose marital escapades are reported by their reliable source that they say they relied on. It is all about Russell, inclined to discount much, he denied her right to separate maintenance or [649] denied her suit for separate maintenance. He found a lack of domestication and then he relates all of the

things that Russell Firestone, the testimony about Russell Firestone and goes on, goes on, telling about her 1964 accident.

Let me digress just one moment. Mr. Frates said, "Why don't they call in her doctors, the ones that treated her when she attempted suicide during the course of the divorce proceedings back in 1964." Declared incompetent for a period of time and declared competent again. Go through the divorce. Treated for a basal skull fracture sustained in an automobile accident. Then she, after the automobile accident, after she was treated for that, she attempted suicide. It is all in the article. They put it in evidence for us. Why don't we pull in the doctors and say well, doctors, come on in and tell us all about these problems that arose when a Palm Beach school teacher marries Russell Firestone? Were the newspapers interested in Mary Alice Sullivan, a one-time Palm Beach County [650] school teacher, taught fifth grade? Are there damages, mental anguish damages? He said we only brought in four people, the next-door neighbor, Doctor Murphy, who gave her a sedative during the Christmas holidays. We brought in John Casey, who his wife—John Casey's wife and John grew up with her here in Palm Beach County, attended high school together with them. We brought in Mrs. Blicher, a dental technician who had to give her a sedative or something when she went into hysterics when the article was brought up about being convicted of adultery. And we brought in Reverend Dan Griffin because Jess Moody, Reverend Moody, is in the orient at the present time. He knew her a lot better. He had consulted with her on many occasions. In the absence of the one she had been going to through the years, the one that was available, and we brought him from Tampa where he has his parish in Tampa, so he came in. Mary Alice gave us over one hundred fifty names of people, friends, [651] and we could

have paraded them in here and had the same thing said over and over again. How do you prove mental anguish? Well, you saw what happened during the period when we put on just the four witnesses. They can't say anything but what was upsetting Mary Alice. You can't say what she told you. You can only say what happened in your presence visibly, describe it. Each one could have gone through various episodes and we would be here for another week and a half. We wanted a fast, clean, quick trial to prove to you that Time magazine not only acted with actual malice—he says we have to prove actual malice in order to prove punitive damages. His Honor is going to charge you that actual malice is a reckless indifference to the rights of others. The reckless indifference to the rights of others. Do you think that Time magazine did not act in a reckless, indifferent manner? Then you take the fair and fairly accurate original draft by Mr. Doerner back there. Qualified privilege, qualified privilege, the first draft, and [652] you know we never even knew this one existed. Remember all the confusion we have had about files. Delaney destroyed his files after he filed his affidavit in support of something that he filed in this law suit. We took his deposition, he lost his files. He doesn't know where they are, they have been destroyed.

Then at the time of the trial they come up with this thing which was the original draft. We don't know how many things that they have in their files over there, whether they are big files or just single files, but this is one they happened to pull out. Apparently they did not realize, not realizing what in the world they are helping us about. We never—Mr. Montgomery, we put on all the witnesses. We never saw them before, never knew who they were, but to find out what they do up there and how careful and accurately they check for the truth, their real interest in things, they have got a whole department of attorneys

up there, the libel suit against Life magazine, and the first draft, if you will [653] read it, Circuit Judge Knott observed, which Knott doubted, the wife was amorous, her amours would have made Doctor Freud's hair curl, while Russell bounded from bed partner to bed partner with the erotic zest of a satyr. We will read the original draft and then read how Mr. Daniels the senior editor, the senior editor of Time magazine, the man who the president did not even consult with about the truth and accuracy of the article after they had a suit filed against them, and when the president, who is now the chairman of the executive committee of Time, Inc., and chairman of the executive committee, that is the committee that runs the entire corporation. There is a board of—what they do, they call it a board of directors and a chairman of a board. But also the chairman of the board, then they appoint and create an executive committee and he is chairman of the executive committee, which runs all the organization. Neither he nor anyone from his office checked with the senior editor in control of and in charge of [654] this Milestones article. Do you believe it? What did President Linen's answer to his interrogatories say, they relied on Joe Farish. It is nice, it is true. Judge Knott. What did Judge Knott say? Did you ever tell anybody from Time that you had convicted her of adultery? No, I never did.

Mr. Frates did us the greatest favor in the world. He got up and says, "Did you ever tell anybody that you convicted her of adultery?" He said, "No." Anybody includes anybody in the world, ladies and gentlemen, and that includes a final judgment. Why do you write something? You write something to tell somebody something, do you not? You look through there and study this final judgment, but you will not find one thing in there other than the fact that he accused her. He has accused her, see, he says she sought separate maintenance. Alimony uncon-

nected with divorce. That is what she was charging. That was her accusation. He charged adultery and extreme cruelty. Nowhere in this final judgment does Judge Knott tell [655] anybody or tell the world that he found her guilty of adultery. But Time magazine, in order to sell magazines, they did it. They did it by the careful editing of the senior editor. He edited that. He edited that and he brought it down. You take a look at the final version under the excellent guidance of that editor. That is what editors do, they edit things, they synsopsize them. Well, in this case they sure synopsized it and twisted it into something that was false and defamatory and has caused damages ever since it was published, and it has never been retracted.

Let's talk about malice just a little bit, for punitive damages because I submit to you this, two hundred twenty-nine million, one hundred two thousand dollars of net worth and as Mr. Frates said, they built this organization on policies and accuracy and treatment of people and articles just like they did in this case. Thank you, Mr. Frates, because if that is their policy, then they have got two hundred twenty-nine million dollars that [656] they got out of the blood and sweat and tears of people that may have been in the same position as Mrs. Firestone. What are punitive damages for? They are as punishment and as a deterrent to them and to others just like them and His Honor will charge you that and he will tell you that if you see fit to tell Time magazine and the rest of the news media that they are going to stop doing this, you are entitled to award a compensatory damage award for her mental anguish and also to award punitive damages to punish them and to tell them don't do it again. Don't pick on somebody else's school teacher's daughter, don't pick on another child of a mother who was not convicted of adultery. Don't do it, Time, because we are going to fine you.

This action has a quasi-criminal aspect to it because of the fact that there is punishment involved. We submit to you, two hundred twenty-nine million, one hundred two thousand dollars of net worth was allowed to be read to you in [657] evidence for a very significant reason. Because puntive damages are sought in this law suit. You take one percent of it, two percent of it, three percent of it, whatever percentage of it that you think is appropriate. One percent of it, two percent of it, three percent of it, ten percent, whatever you think is appropriate. Tell Time magazine if you do wrong you are going to be fined just like a person who drives down the street fifty miles an hour in a school zone. What does the Judge do? He fines him probably fifty dollars. Don't you ever do that again, you might hurt somebody. Don't do it. This is the same concept with respect to libel. Don't do it again. You are going to hurt somebody else. If we had a corporation or an individual that had five hundred or two hundred twenty-nine dollars of net worth and he did something, if he did something wrong, two hundred twenty-nine dollars, we are all used to thinking in these terms, ladies and gentlemen, and you would fine him. What would you fine him, fifteen [658] dollars, twenty dollars? Wouldn't have any problem with that, would you? You take somebody with two hundred twenty-nine million, one hundred two thousand dollars of net worth, you are going to fine them fifteen dollars? Fifteen thousand dollars? One hundred fifty thousand dolars? Fifteen million dolars? You fine them something that is going to make them not do what they say they did. I'm sorry, I misstated that. What they say they are not guilty of. They say they truthfully and accurately reported that thing with fairness and impartiality to all parties concerned and they did not, in that they come in here and they still lie to you, that they still believe it, and how careful and accurately we have done all this. You

punish them for it. You render a verdict and punitive damages as well as compensatory.

The profits they made on that magazine alone, the mental anguish or two and a half years Mrs. Firestone has lived with that. They made a million seven hundred thousand something dollars, something like that on [659] that one magazine. That includes the revenues from the advertisements. Take a look at the advertisements on Page 7 where this article appears. They distribute this magazine to the children in schools and they solicit teachers to buy this magazine. They have Christmas prayers in here. They even wish Mary Alice Firestone a Merry Christmas, a Merry Christmas to all of you. Two days, three days before Christmas they send this Milestones out. They sell, they have pictures of the boys relaxing in Viet Nam, this kind of stuff. It sells magazines and Milestones sells magazines and an invitation to teachers, one time Palm Beach County school teacher, convicted of adultery. Read that little article for the children in the schools. Maybe even Mark will get a chance to read it. He is seven now. Merry Christmas, Mary Alice Firestone.

Ladies and gentlemen of this jury, I don't know how long I have talked.

The Court: Twenty-five minutes.

[660] Mr. D'Aiuto: I am not going to take up any more of your time. We wanted a fast, quick, clean trial. We wanted you to see what Time, Inc., looks like. The only way you can expose it is to get in its guts and to see how it operates. Did they tell the truth when they said they didn't have a copy of the final judgment available to them when their own attorneys representing Time magazine in the libel suit that is still pending in Federal Court by Mary Alice Firestone, because she bought a witness, bought a witness is what they accused her of in that case.

The same law firm representing Russell Firestone in a divorce action. Offices right across the street, quotes directly from the final judgment. But they didn't have a copy of the final judgment. They had no access to legal talent whatsoever. As to what the findings of the Judge were and what the grounds of the divorce was granted on. Mrs. Nadasdy, who is charged with checking the accuracy of each word, and adultery [661] does not have a dash over it. How carefully did she comply with the Time requirement? What did Mr. Doerner say about reliance upon source of materials? For the final draft he said we never rely on anything, our dispatchers, our Time files. We check for accuracy. We never relied—look at their files, their dispatches. By their own words they proved themselves liars and by their conduct they branded Mrs. Firestone adultress, and as Miss Nadasdy said, when you rule you pass sentence.

Ladies and gentlemen, I leave it up to you to pass sentence on Mrs. Firestone on the basis of the proof that they have cited. Was she convicted of adultery? And therefore stand before this community and this world as a convicted adultress? Or was she innocent of those charges as she has attempted to prove two and a half years because they won't retract. Wouldn't retract because of the libel suit pending and because of whatever reasons Time, Inc., may have had with respect to saying, Mary [662] Alice Firestone, you are nothing.

Thank you.

Mr. Frates: Your Honor, I have several motions, but if it is all right with you I will wait until you charge the jury.

The Court: Shouldn't we wait until I charge the jury and let them go out and then I will hear any motions or objections you decide on from either side.

[663] COURT'S CHARGE TO THE JURY

The Court: Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict.

It is your duty as jurors to consider and weigh the evidence, to decide the disputed issues of fact and to apply the law to the facts as you find them from the evidence.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest, if any, in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his ability to remember the matters about which he testified, and the reasonableness of his testimony considered in the light of the evidence in the case and in the light of your own experience and common sense.

The issue for your determination on [664] the claim of the plaintiff against the defendant is whether the defendant published a writing or article concerning the plaintiff which was defamatory in nature, and if so, whether this was a legal cause of damage to the plaintiff.

If the greater weight of the evidence does not support the claim, then your verdict should be for the defendant. If, however, the greater weight of the evidence does support the claim of the plaintiff, then you shall consider the defenses raised by the defendant. On these defenses the issues for your determination are whether the publication was conditionally privileged and whether the facts stated in the publication were true. If the greater weight of the evidence supports either defense, then your verdict should be for the defendant. If, however, the greater weight of the evidence does not support either defense and the greater weight of the evidence does support the claim of the plaintiff, then your verdict should be for the plaintiff.

[665] Now greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in this case.

I charge you that if one falsely and without privilege to do so publishes a libel which imputes to another conduct constituting a criminal offense, he is liable to the other. Adultery is a criminal offense.

In general, publication of reports of judicial proceedings are qualifiably or conditionally privileged. In order to be privileged, the report must be not only fair and impartial, but also accurate in regard to material matters.

An account of a judicial proceeding is fair and accurate if reported either literally and completely or by a condensed summary. Privilege protecting publication of reports of proceedings of judicial bodies includes not only matters of proof and remarks of the Court, but also reports of pleadings, orders and judgments as well.

I instruct you that there can be no [666] recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of Firestone versus Firestone.

I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the publication complained of was substantially true.

Now if you find for the defendant, you will not consider the matter of damages, but if libel is proven by the greater weight of the evidence which caused actual damage to the plaintiff, you should award the plaintiff an amount of money that will fairly and adequately compensate her for such damages.

It is only damages which are a direct and natural result of the alleged libel which may be recovered.

If you find the plaintiff is entitled to recover damages, you may consider any shame, mortification, mental anguish or hurt feelings experienced in the past.

[667] There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in the light of the evidence.

If you find for Mrs. Firestone and find also that the defendant, Time, Inc., acted with malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others, you may in your discretion assess punitive damages against Time, Inc., as a punishment and as a deterrent to others.

If you find that punitive damages should be assessed against Time, Inc., you may consider the financial resources of the defendant in fixing the amount of such damages.

Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.

When you retire to the jury room you [668] should select one of your number to act as foreman to preside over your deliberations and sign your verdict. Your verdict must be unanimous. That is, your verdict must be agreed to by each of you.

Now you will be given two forms of verdict which will be sent out for your use. You will use one of them, depending upon what your conclusions are. If you determine that your verdict should be for the plaintiff you will use this form which reads, "Verdict", and says, "We, the jury, find for the plaintiff, Mary Alice Firestone, and against the defendant, Time, Inc., and assess her compensatory damages in the sum of blank dollars." There is a blank in there and you fill in the amount in dollars and cents if you find she is entitled to receive compensatory damages.

Then it goes further and says, "We further find for the plaintiff, Mary Alice Firestone, and against the defendant, Time, Inc., and assess punitive damages against Time, Inc., in the sum of blank dollars." Then if you assess punitive damages in the [669] case you fill in that blank the amount of punitive damages you assess under the charge I have given you. If you find no punitive damages, you write in that blank, "None."

On the other hand, if you find for the defendant, Time, Inc., you use this form of verdict which simply reads, "We, the jury, find for the defendant, Time, Inc." Both verdicts conclude with the words, "So say we all." There is a place for you to have your foreman sign the verdict and a place for you to put in the date.

As you understand, you use only one of these forms of verdict, depending upon what your findings are. These forms, together with all the exhibits in the case will be sent out to the jury room for your use.

Now as I have said, you should first select one of your number to act as your foreman, or forewoman, who will preside over your deliberations and sign your verdict when it has been received.

Counsel, it would seem to me if you agree that before they start their [670] deliberations we would have the Bailiff take them to lunch. I think this would be best rather than break it up in a little while and then when they come back they can deliberate.

Is it satisfactory with counsel if, when the Bailiff brings them back from lunch he can take them into the jury room where the exhibits are without the necessity of formal opening of the Court?

Mr. Montgomery: Yes, sir.

Mr. Frates: Yes, sir.

The Court: All right. Fine.

Ladies and gentlemen, if you will now retire just for a moment, I have got another instruction to give you when we get through here and then Mr. Jenne, the Bailiff, will take you to lunch.

Let me ask you not to discuss the case while you are at lunch. You will be in a public place, and people might hear you and you wait, and when you come back all the exhibits will be in the room and then you can start your deliberations, so you will retire back there just for probably five [671] minutes or so and then the Bailiff will take you to lunch.

(Thereupon, the jury retired from the Courtroom at 11:45 o'clock a.m.)

The Court: First, gentlemen, let me take care about the objections to these instructions.

Let the record show that at the conference on instructions, counsel stipulated that all objections should be reserved to both parties to any instruction given by the Court which were not requested by that particular party, and objects to the Court's failure to give any instructions which were requested in writing by that party or which were requested orally in open Court.

The Court approved this stipulation and all future proceedings should be governed thereby.

Gentlemen, do you think that covers everything?

Mr. Montgomery: Yes, sir, except for one. I did not request in writing the Florida Statutes, 61.08. I don't know whether it is in the [672] record that I did request it and Your Honor refused that particular statute. I believe that is the number, about the adultress wife, and I think the other one is 61.041, 61 or 68, I have forgotten, but anyway those two particular statutes.

The Court: Two statutes were requested by the plaintiff orally before the Court and the Court refused these and of course the objections to the Court's refusal is preserved.

Do you have any motions, the plaintiff now, anything else?

Mr. Montgomery: Nothing else.

The Court: Defendant?

Mr. Frates: Your Honor, we wanted to put on the record several portions in the rebuttal of Mr. D'Aiuto's argument that were in direct conflict with Your Honor's written note to us and instruction.

The Court: All right. If you will just mention them.

Mr. Frates: The first one, Your Honor, was he argued that domestication or lack of domestication was a ground for a divorce. [673] He used that term. I didn't have time to write it down, but he used grounds, and this is in direct conflict with Your Honor's statement.

He also commented again on the statutes and they have been trying to get these two in——

The Court: Go ahead, Mr. Frates, but let's don't argue because you have a motion this is leading up to, I assume?

Mr. Frates: No, sir, I want them on the record.

The Court: State them without argument.

Mr. Frates: That he stated that he—I didn't get a chance to write this one down, but he mentioned the alimony, and again, if I could quote it it would speak for itself, Your Honor, but the only inference you could draw from that is that you could not be awarded alimony if you are found guilty of adultery. These are the very things—I am arguing. I will stop that.

And he repeated that again and again in rebuttal where we had no chance to reply to it.

The Court: All right.

[674] Mr. Frates: He also said that they had never heard of these people and I didn't stand up and object, but

the record reflects that this is incorrect, in the arguments to the jury.

There were numerous other factual statements, not conclusions, factual statements that counsel stated that were completely wrong and they were inflammatory, and the other one that he mentioned, Your Honor, which was highly inflammatory, again all in rebuttal, said that we charged her with buying a witness. Goes into that case. That evidence is not before this jury and it is the sole purpose of trying this case on pure and simple prejudice and we have no recourse to any of those statements on rebuttal.

The Court: All right. You are not making any motion to the Court at this time, is that right?

Mr. Frates: No, Your Honor, because as we have said before, we have been through a week of trial.

The Court: You don't have to, there is nothing [675] for me to say in response.

Mr. Frates: No, sir, but I think this record ought to reflect this because it has been tried in an atmosphere as represented by these things, of pure prejudice.

The Court: All right. I have nothing more to do so we will recess.

The Bailiff tells me it will take at least an hour and a half for their lunch.

Mr. Frates: Judge, one thing I didn't catch. I don't know as Your Honor instructed the jury the verdict had to be unanimous.

The Court: Yes, I did. I used the words out of your own charge.

Mr. Frates: I didn't hear it.

The Court: You heard it, Mr. Montgomery?

Mr. Montogmery: Yes, I heard it.

The Court: Gentlemen, you will be excused then until —well, there is no use to come back before twelve-thirty at the earliest. The only reason to come back then is the

jury might have a question. They won't be back until about that time. However, we are not going to reconvene the Court when he brings them back. Mr. Jenne is an [676] experienced Bailiff in this, he will just bring them back and put them in the jury room and they can start, but counsel probably better be here about one-thirty in case they come back and then have a question.

Mr. Montgomery: One-thirty?

The Court: One-thirty. Counsel is excused until one-thirty.

Court is recessed until we hear from the jury.

(Thereupon, at 11:50 o'clock a.m. the Court was in recess for lunch.)

[677] Afternoon Session

(Whereupon, the following proceedings were had in chambers in the presence of the Court, counsel and the Court reporter at the hour at 3:05 o'clock p.m.)

The Court: Mark the time and state that the Bailiff, the Court Bailiff just came into the Court and handed a note to me from the jury which said, can the jury or does the jury have authority to award compensatory damages to be held in trust for son Mark. I just ruled no, and sent it back.

Mr. Frates: Of course, Your Honor, on that basis, this goes right to the thing that we objected consistently about, is that the argument was made that this is damage to Mark which was really damage to his mother's reputation.

The Court: Let me say this, Mr. Frates. Let's assume your argument or your point that you made, and I think you put it in the record, [678] assume that it is correct, at

this point what I am asking is, if it's correct, maybe it's grounds for reversal if you lose or something, but at this point right now do you want me to call the jury back in and let them ask the question orally? That is the answer of course.

Mr. Montgomery: That's the answer, I agree.

The Court: That's the answer, no, they don't have authority.

Mr. Frates: They don't have authority, but obviously someone is saying they want to give Mark, and this again was the whole tenor of that argument, give Mark money for the damage to his mother's reputation, not her money for her mental pain and suffering, and this I would have objected to had Your Honor not, throughout the argument, had Your Honor not ruled that we could not object and I didn't object.

The Court: I didn't mean you could not ever object.

Mr. Frates: No, sir, I realize that but Your Honor indicated——

The Court: In fact, in one place you objected [679] and I believe I told Mr. D'Aiuto to stop. Let me ask you this, we are in a situation now, here's what I did. The ordinary procedure would be for the jury to come in and ask me this question and I would give them that answer in the box and they would go back out. Now, do you have any motion or any objection to make?

Mr. Frates: Well, I would like to talk to co-counsel on the thing but it seems to me this jury should be instructed that I instruct you no, and that you cannot consider any damages to Mark.

Mr. Medina: Mark is not a party.

Mr. Frates: Mark is not a party.

The Court: That's why I said no.

Mr. Frates: No, but what they are doing, Judge, is just as they argued, they argued the case for little old Mark. Now, I agree he needs help, but I hope——

The Court: Well, now, you confer and put anything in the record, any motion or any objection you have that you wish to make, put it in the record.

Mr. Frates: Well, I think this jury ought to be [680] called back, I move the Court to call the jury back, instruct the jury on the basis of their charge, request, to instruct the jury that the only element of damage, if any, is the mental pain and suffering of her, and that they cannot award anything to Mark or anything else for any of these other items because this is purely and simply reputation. This is, what is little Mark going to think of his mother, and Mark is going to think of his mother as to——

The Court: Obviously, they shouldn't consider money for Mark, and you gentlemen might consider this, it might be advisable from your standpoint to make that clear to them.

Mr. Montgomery: No, sir, I would object to that by reason of the fact that if the question had come out in the Courtroom and Your Honor had made the decision as to how to answer it with a simple no, which you did, you have accomplished exactly by writing on there no, that you would have in the Courtroom, and I think any further charge along those lines, especially since you have once answered the question, to call [681] them back in to drill them on it without giving them, I don't mind you re-charging them so far as that's concerned on damages, I think that would be the thing to do, is to re-charge them on damages if you are going to do anything, but no comment on their particular question once you have answered it, it's a double-barreled, it's like giving for the defense the contributory negligence charge twice. That's my only point.

Mr. Frates: My answer to that, Your Honor, is that both in direct and the opening argument and the rebuttal argument, they over and over again stressed this damage

to Mark which is not a recoverable item and the jury hears it without any objection, without any instruction, and they are obviously, I would agree that Your Honor doesn't want to disrupt them, but it's clear that someone on this jury or maybe all of them are considering an element of damage which has been eliminated and this is the bind they eliminated and prevent us from coming in and attacking, but then go [682] ahead and argue it.

The Court: Well, I think the thing is done. I think I will deny your motion at this time. We'll see. If they have another question, we will go out in open Court.

Mr. D'Aiuto: You have no objection to the Court having answered the question, you feel he should have answered more; is that correct?

The Court: He feels I should charge the jury more.

Mr. Frates: No, I object to the whole procedure. I think that had the jury come in, I would have stood up and made the motion in front of the jury.

Mr. Montgomery: I would certainly have objected.

The Court: All right. All right, I've ruled on it, so we'll see what the next thing is.

(Whereupon, at the hour of 3:25 o'clock p. m., Court was convened and the following proceedings were had in the presence of the Court, counsel, the jury and the Court reporter.)

[683] The Court: Have a seat. Who is your foreman, please?

Mr. Shapiro: Yes, sir.

The Court: Have you reached a verdict?

Mr. Shapiro: Yes, we have, Your Honor.

The Court: Would you hand it to the Clerk with all the other papers. Just hand it to him. All right. The Clerk will read the verdict of the jury.

The Clerk: The verdict, West Palm Beach, Florida, July 16, 1970, we, the jury, find for the plaintiff, Mary Alice Firestone, and against the defendant, Time, Inc., and assess her compensatory damages in the sum of $100,000. We further find for the plaintiff, Mary Alice Firestone, and against the defendant, Time, Inc., and assess punitive damages against Time, Inc., in the sum of none, so say we all, Adolph M. Shapiro, foreman.

The Court: Is that your verdict, ladies and gentlemen?

Mr. Shapiro: Yes, sir.

The Court: All right. The verdict is already recorded.

[684] Mr. Frates: Your Honor, may we have the jury polled?

The Court: Sure. Ladies and gentlemen, the Clerk will call your name and as he calls each of your names, you make the answer that is my verdict or that is not my verdict, whichever the case may be.

The Clerk: Adolph M. Shapiro.

Mr. Shapiro: That is my verdict.

The Clerk: Ruth M. McAllister.

Mrs. McAllister: That is my verdict.

The Clerk: John C. Sailors.

Mr. Sailors: That is my verdict.

The Clerk: Lucien A. Samyn.

Mr. Samyn: That is my verdict.

The Clerk: Minnie B. Drew.

Mrs. Drew: That is my verdict.

The Clerk: Charles J. Sheridan.

Mr. Sheridan: That is my verdict, Your Honor.

The Clerk: Thank you.

The Court: All right. Thank you very much, ladies and gentlemen. Appreciate your attention and help here. The Clerk will mail the checks to you promptly for your services in accordance with the statutes, [685] and at this time you are released from your subpoenas and from any further service. Thank you very much.

Mr. Bailiff, will you show the jury out.

(Whereupon, the following proceedings were had in open Court in the presence of the Court, counsel and the Court reporter.)

Mr. Frates: Your Honor, at this time we would like to ask, or notify the Court, I think in accordance with the statute, that we intend to interrogate the jurors in view of the note that was sent back to them as to whether or not they could award in trust the damages for the son, Mark, on the basis that this was not a material element of damage.

The Court: Wouldn't the proper thing be, under the rule, don't you have to file a motion?

Mr. Frates: I am filing a motion now, Your Honor, in Court. I don't think I have to have permission to do it.

[686] The Court: I don't think you do either.

Mr. Frates: No, sir, but I am filing the motion now so that we can——

The Court: The Court will ask that you prepare it in writing.

Mr. Frates: All right, sir. We feel that the verdict is returned on an element of damage that is not in issue in this case.

Mr. Montgomery: May I have no comment in open Court, please?

The Court: The Court directs you, and you have a right to file such a motion, I ask that you file it in writing so it will be a part of the record. I believe the rule also calls for a hearing on the motion or——

Mr. Frates: No, sir, I don't think so, and I don't want to represent to Your Honor, I think all it says is that you have to notify the Court that you are going to do that, I'll check that and file it with you.

The Court: File whatever the rule is.

Mr. D'Aiuto: Your Honor, may I say something in that regard? With respect to the interrogation of jurors, I have had experience with this before, I would request [687] His Honor to take into consideration, if he intends to do so, that it be done in the presence of the Court under appropriate supervision.

Mr. Frates: Right now?

The Court: No, we are not going to do anything right now. File a motion, under the rule, whatever it provides for. Of course he will have to serve you with a copy. If you have something in response thereto, you have a right to file it. But you have a right to file this motion without leave of Court, but, of course, the Court is requesting you to file it in writing. All right, gentlemen. Mr. Clerk, you and I will stay just a minute to make sure we have all these papers properly marked and recorded. Court will be adjourned, Mr. Bailiff. I'll just stay here.

(Thereupon, at 3:30 o'clock p.m. Court was adjourned.)

[688] CERTIFICATE

* * *

Plaintiff's Exhibit 1

MILESTONES

* * *

DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."

* * *

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA. IN CHANCERY

Case No. 64 C 2790 C

MARY ALICE FIRESTONE,)
Plaintiff,)
vs.) FINAL JUDGMENT
RUSSELL A. FIRESTONE, JR.,)
Defendant.)

Plaintiff's Exhibit 2
523

This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery, and the wife's answer thereto setting up certain affirmative defenses. The testimony of numerous witnesses was submitted by the parties before the court in both open and closed sessions over a period of about 17 months, with a record running into thousands of pages.

The parties were married on August 1, 1961, in New York, N.Y. One child, Mark, was born of the marriage on January 31, 1963, of whom each parent seeks custody. The parties lived together in Texas, Illinois, New York and Palm Beach, Florida, until October, 1964, at which time they separated in Palm Beach, and have not lived together since. The plaintiff is 32 years of age and was a schoolteacher before her marriage to defendant, who is 41 years of age. This is her first marriage and his third marriage.

According to certain testimony in behalf of the defendant, extra-marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much

of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida in the case of Chesnut v. Chesnut, 33 So. 2d 730, where the court, in holding that a divorce rather than separate maintenance should be granted, said:

> "The big trouble was total incapacity on the part of either for domestication. Seventy-five per cent of successful marriage depends on tact to cushion and bypass domestic frictions. It is much better than meeting them head on and bearing the scars they leave. When the bride and the groom are both devoid of a yen for domestication, the marital bark puts out to sea with its jib pointed to the rocks . . . . We think the record reveals a complete allergy to the give and take essential to successful marriage."

524

In the case of Spencer v. Spencer, Fla., 193 So. 2d 40, the court stated:

> "We determine that the legal effect of the evidence was sufficient to prove the alleged grounds for divorce on behalf of the wife or the alleged grounds for annulment or divorce on behalf of the husband. The explanation or rebuttal of each to the evidence of the other lacks substantial evidentiary value, and there is no real conflict of specific fact. Neither party is domesticated, and the marriage should be dissolved . . . . The doctrine of recrimination should not be applied here. Its application is most applicable when a party seeks to take advantage of an act or omission which he himself induced. It may be invoked because of the nature of the wrong, either for the benefit of the court and society or for the benefit of the defendant, when to do otherwise would be to allow one party to take an unfair advantage of the other party. Stewart v. Stewart, 1946, 158 Fla. 326, 29 So. 2d 247, 170 A. L. R. 1073."

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In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

Plaintiff strongly resists her husband's claim for divorce; looking beyond matters of crass financial nature, she urges that her marriage be preserved in order to protect guileless womankind from defendant's roving marriage tendencies. As phrased by her counsel, he should not be allowed to "hop from wife to wife while leaving a child here and there along the way." It might be argued with equal plausibility that the present marriage should be preserved for defendant's own protection from predatory females whose amorous instincts seemingly are instantly aroused to fever pitch by the charm of his wealth. It might readily be contended also that others, in the spirit of the day, have equal rights to share in the economic fruits of the more abundant life provided by defendant's marriage proclivities.

Such arguments, of course, have no relevancy or applicability here; this court is neither a penal institute nor an instrument of social or economic reform, being concerned solely with the respective rights of the parties to the relief sought in the light of the evidence and the viability of the marriage relationship.

With a gross 1965 income from family trusts totaling $521,888.47, the defendant may be considered a man of conspicuous wealth, although a maze of spendthrift restrictions, pledges, alienations and assignments for various purposes, among which are obligations for the support of three children by two previous wives and alimony for one of the latter; debts totaling approximately $1,400,000; individual business operations involving helicopters, airplanes, racehorses and real estate, and taxes reaching the current maximum 70 percent bracket overlying the whole, tend to rob the financial picture of much of its rosy hue.

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The substantial residue remaining after initial deductions by defendant's principal trustee, The Cleveland Trust Company, for certain major obligations is sent by the trustee to a firm of attorneys in West Palm Beach, who disburse the remainder under the supervision of The Cleveland Trust Company. According to the testimony of defendant's Florida accountant, his living expenses are calculated at $3,000 per month. Since defendant gave up polo in 1962 his expensive hobbies have been confined largely to speculative business ventures. Much of the expense involved in the extravagant mode of living adopted by the parties during the 38 months they lived together was due to an indulgence of plaintiff's tastes, which according to her testimony included an average monthly expenditure of $5,000 for clothes and a $3,000 monthly allowance for 'spending money,' covering such varied items as support for her mother and a press clipping service which she desires to continue. An 'economic analysis' submitted by plaintiff indicates that in order to maintain the same level of material well being for herself and her child, a sum between a minimum of $6,765 and a maximum of $15,144 per month will be required; based on this, plaintiff requests an allowance of $8,375 per month.

The minor child of the parties has been in the temporary custody of the plaintiff, and the evidence demonstrates that she has shown affection for him and devoted time and attention to his care. The court finds that plaintiff is entitled to be awarded the custody of said minor child.

During the marriage defendant collected $184,400 in insurance proceeds as the result of the loss of a diamond ring being worn by his wife, taken from her in a robbery. Plaintiff had bought the ring in July 1961, obtained insurance on it and paid the premiums. He used portions of the insurance proceeds for payments to jewelry and clothing firms and applied the balance toward other debts, mortgages and taxes. Plaintiff contends that the ring was a gift to her, that she was the sole lawful beneficiary of such insurance proceeds and seeks to collect the same from defendant. The court has concluded that this claim must be denied.

A claim has been presented by the plaintiff's former attorneys, Miller, Cone, Owen Wagner and Nugent, Esqs., for their costs and fees as her counsel in earlier stages of this proceeding, which is proper and allowable in the opinion of the court. A further claim by the same legal firm is presented for hotel expenses incurred by the plaintiff and her brother, who had been appointed guardian of her person at that time, in the amount of $9,233.50 which was paid by her former attorneys because of a guarantee made by them to the hotel at which plaintiff and her brother resided from November 25, 1964, to January 29, 1965. This claim is denied, without prejudice.

In 1962 the parties acquired as tenants by the entirety a residence at 236 Pendleton Avenue, Palm Beach, Florida. This residence constituted the marital domicile of the parties from the date of purchase until their separation, and the wife continues to reside therein. There was a mortgage balance of approximately $38,000 as of January 1966 which has been reduced by monthly payments since then. The court finds that this home should be awarded to the plaintiff as a residence for herself and the child, with the remaining mortgage indebtedness to be assumed by the defendant.

Defendant owned eight thoroughbreds which he allowed plaintiff to race under her name and colors. Plaintiff claims to be entitled to the horses or the value thereof. She also claims the value of furniture and chandeliers purchased for their Dallas apartment and subsequently disposed of by defendant. These claims are denied. Plaintiff further contends that defendant should be required to pay sundry bills amounting to approximately $100,000 bills incurred by her during the marriage, which were submitted in evidence. The court is of the opinion that claims of this nature are more appropriately litigated by the purported creditor and debtor in a court of law than in a court of chancery jurisdiction, and therefore the claim in such respect is denied without prejudice.

BEST COPY AVAILABLE

Expert testimony offered by plaintiff and defendant as to the amount of a reasonable fee for the services of plaintiff's counsel varied between $43,260 and $95,000. The court is of the opinion that a reasonable fee for such services is the sum of $50,000, including $10,000 heretofore awarded as a temporary counsel fee.

The premises considered, it is thereupon

ORDERED AND ADJUDGED as follows:

1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.

2. That custody of the minor child, Mark Allen Firestone, is hereby awarded to the plaintiff with reasonable rights of visitation reserved unto the defendant. Defendant shall pay unto the plaintiff the sum of $750 per month for the care, maintenance and support of said minor child, beginning January 1, 1968.

3. That the defendant shall forthwith transfer all of his right, title and interest in and to the marital domicile located at 236 Pendleton Avenue, Palm Beach, Florida, unto the plaintiff, the defendant to assume the outstanding mortgage indebtedness.

4. That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff.

5. That the plaintiff's claims (a) for insurance proceeds collected by the defendant as the result of the theft of the said diamond ring, (b) for the said racehorses or value thereof, (c) for the value of the said furniture

and chandeliers and (d) for the said sundry unpaid bills, are severally denied.

6. That the claim by the plaintiff's former attorneys for reimbursement of expenses guaranteed by them for the plaintiff and her brother is denied, without prejudice.

7. That the defendant pay unto the firm of Farish & Farish as attorneys for the plaintiff the sum of $50,000, which shall include the amount of $10,000 heretofore awarded as temporary attorney's fees to said firm. Defendant shall pay to the firm of Miller, Cone, Owen, Wagner and Nugent the sum of $3,500 for their legal services in plaintiff's behalf, together with the further sum of $856.92 in reimbursement of costs and expenses.

8. The costs shall be taxed upon further hearing after notice.

DONE AND ORDERED this 15th day of December, A. D. 1967.

James R. Knott
Circuit Judge

Plaintiff's Exhibit 3

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Firestone Granted Divorce; She Vows Fight

By MONA MORRIS
Herald Staff Writer

WEST PALM BEACH — Rubber fortune heir Russell A. Firestone Jr. and wife Mary Alice were never "domesticated," a Circuit Court Judge decided in an order Friday ending their six-year marriage.

Firestone, 41, was granted the divorce he sought after Mrs. Firestone, 32, suited for separate maintenance. But he'll have to pay $3,000 a month alimony.

Judge James R. Knott cited a Florida Supreme Court ruling which described "domestication" as the "give and take essential to successful marriage."

Russell A Firestone Jr.
... poor little rich boy

"According to certain testimony in behalf of the defendant (Russell), extramarital escapades of the plaintiff (Mary Alice) were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in the plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr," Judge Knott wrote in the final judgment.

The judge added that he discounted much of the testimony as "unreliable."

"In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved," Judge Knott ruled.

sion. She fought for separate maintenance, instead of a divorce.

Her attorney, Joseph Farish Jr., was granted a $50,000 fee, to be paid by Firestone.

But Mrs. Firestone was happy on one point. The court granted her custody of their son, Mark Allen, who's almost five.

"That was the most important thing to me," the raven-haired, petite former school-teacher sighed.

She'll get $750 a month for child support, in addition to the $3,000 a month alimony. That totals less than the amount she spent each month on clothes when she and Russell were living together, according to trial testimony.

It was her first marriage and Russell's third.

Among the things Mary Alice wanted, but didn't get, in the suit were $8,375 a month allowance; $184,000 in insurance proceeds from the 1962 theft of a 27-carat diamond ring, eight racing horses; and $23,000 to pay back debts.

Mary Alice Firestone
... wanted maintenance

She will, however, get the Pendleton Pl. house, with remaining mortgage payments to be paid by her ex-husband.

Financial testimony by the defense portrayed Russell as a poor little rich boy, with a yearly income of half million dollars. But it's tied up in debts of $1.4 million, alimony to one ex-wife, support of three children of the former marriages, and spendthrift clauses in various trust funds, his lawyers claimed.

The family fortunes stemmed from Russell's grandfather, industrialist Harvey S. Firestone. Russell's mother, now Mrs. John Galbreath, owns among other things, the Darby Dan Farms racing stables.

During the months-long court proceedings, Mary Alice maintained she favored reconciliation. Russell testified that he didn't.

Judge Knott granted custody of young Mark Allen to Mrs. Firestone, saying the evidence showed she has "shown affection for him and devoted time and attention to his care." He also granted Firestone "reasonable" visitation rights.

Pair Fight Baby's Burial As Pauper

Miami Herald-Washington Post Wire

ALEXANDRIA, Va. — An Alexandria couple whose baby had been given a court-ordered pauper's burial by the city Thursday said Friday they will start legal proceedings to regain possession of the body in order to give it another funeral.

Mr. and Mrs. John A. Colley have contacted attorney T. Brooke Howard about preparing a petition. Howard confirmed Friday night that he had been called by the husband and said he probably will take legal action as soon as possible after meeting with the couple Monday.

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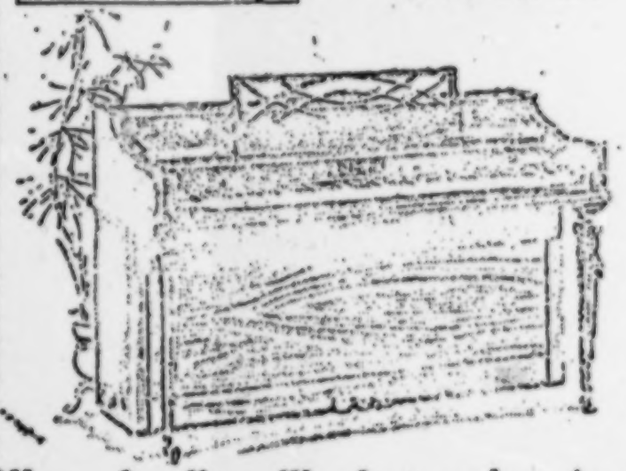

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Firestone Granted Divorce; She

By SIONA MORRIS
Herald Staff Writer

WEST PALM BEACH — Rubber fortune heir Russell A. Firestone Jr. and wife Mary Alice were never "domesticated," a Circuit Court Judge decided in an order Friday ending their six-year marriage.

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The judge added that he discounted much of the testimony as "unreliable."

"In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved," Judge Knott ruled.

The case was originally filed more than two years ago. Testimony was given in court, sometimes in closed door sessions, in a series of hearings over a 17-month period.

Mrs. Firestone, at the Palm Beach home she'll keep under terms of the divorce, vowed that she'll appeal the decision. She fought for separate maintenance, instead of a divorce.

Her attorney, Joseph Parish Jr., was granted a $50,000 fee, to be paid by Firestone.

But Mrs. Firestone was happy on one point. The court granted her custody of their son, Mark Allen, who's almost five.

"That was the most important thing to me," the raven-haired, petite former schoolteacher sighed.

She'll get $750 a month for child support, in addition to the $3,000 a month alimony. That totals less than the amount she spent each month on clothes when she and Russell were living together, according to trial testimony.

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V. Nadasdy

TELEPHONE 3214 RECORD 13

DEC. 16, 1967 1:25 PM

FROM: BOB DELANEY - MIAMI

TO: APPLEGATE

FOR: MILESTONES - FIRESTONE DIVORCE

BEST COPY AVAILABLE

Plaintiff's Exhibit 4

532

THE NAME OF FIRESTONE IS SPELLED RUSSELL A. FIRESTONE, JR. HE WAS FORTY-ONE YEARS OLD SOMETIME IN JULY. HIS WIFE IS NAMED MARY ALICE AND SHE JUST HAD HER THIRTY-SECOND BIRTHDAY A WEEK OR TWO AGO. THEY WERE MARRIED IN NEW YORK CITY AUGUST 1, [illegible] 1961. [illegible] THEIR SON WHOSE NAME IS MARK WAS BORN JANUARY 31, 1963. I HAVE DOUBLE CHECKED THE ALIMONY AT DUNCAN'S REQUEST AND IT TO BE THREE THOUSAND DOLLARS A MONTH FOR HER PLUS SEVEN HUNDRED AND FIFTY DOLLARS A MONTH FOR CHILD SUPPORT. SHE HAS BEEN GIVEN CUSTODY OF MARK, THEIR SON. THE TECHNICAL GROUNDS FOR DIVORCE ACCORDING TO JOSEPH FARRISH, JR., ATTORNEY FOR MARY ALICE FIRESTONE, WERE GIVEN AS EXTREME CRUELTY AND ADULTRY. THE JUDGE, HOWEVER, IN QUITE A COLORFUL OPINION SAID THAT [illegible] NEITHER OF THEM "HAS SHOWN THE LEAST SUSCEPTIBILITY TO DOMESTICATION AND THAT THE MARRIAGE SHOULD BE DISSOLVED." JUDGE KNOTT SAID "SHE (MARY ALICE) URGES THAT HER MARRIAGE BE PRESERVED IN ORDER TO PROTECT GUILELESS WOMANKIND FROM DEFENDANT'S ROVING MARRIAGE TENDANCIES; AS PHRASED BY HER CONSUL HE SHOULD NOT BE ALLOWED TO 'HOP FROM WIFE TO WIFE WHILE LEAVING A CHILD HERE AND THERE ALONG THE WAY'". THE JUDGE ALSO SAID "IT MIGHT BE ARGUED WITH EQUAL PLAUSIBILITY THAT THE PRESENT MARRIAGE SHOULD BE PRESERVED FOR DEFENDANT'S OWN PROTECTION, FROM PREDATORY FEMALES WHOSE AMAROUS INSTINCTS SEEMINGLY ARE INSTANTLY AROUSED TO FEVER PITCH BY THE CHARM OF HIS WEALTH".

HJB

UNUSED

DEC 22 1967

Divorced. Russell A. Firestone Jr., 42, heir to the tire fortune, by Mary Alice Sullivan Firestone, 32, one-time schoolteacher; on grounds of adultery; after six years of marriage, one son; in West Palm Beach, Fla. The seven-month trial produced enough testimony of extra-marital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."

533 Plaintiff's Exhibit 5

BEST COPY AVAILABLE

MIAMI BUREAU

DEC. 15, 1967

APPLEGATE

MILESTONES scheduling the divorce granted to Russell A. Firestone, Jr. from his wife Mary Alice Firestone. Need the grounds on which it was granted in the words of the judge. [redacted] begins. [redacted] on the case and the Firestones themselves [redacted] last. When were they married? [redacted] they [redacted]? Need birthdate for both parties as well as for their son. How much alimony will she get? What about custody of their child? What is the correct spelling of his name, [redacted] Understand that the court hearings were quite something, socialites, police, detectives testifying [redacted] on behalf of both parties. Need usable quotes.

Plaintiff's Exhibit 6

534

CONFIDENTIAL

FROM: URSULA NADASDY

~~Telephonemessage~~

Dec. 16, 1967

Telephone conversation with Dick Duncan

Russell A. Firestone initiated the divorce action, and was granted the divorce

Thus, he was the plaintiff, not the defendant , as the Dec. 16, ~~19~~ 67

Telephone 3211 Record 13 file claims.

Plaintiff's Exhibit 7

Nadady

TELEPHONE 3214 RECORD 17

DEC. 16, 1967 2:50 PM

Plaintiff's Exhibit 8

536

FROM: DICK DUNCAN - MIAMI

TO: APPLEGATE

FOR: MILESTONES - FIRESTONE DIVORCE

THE SUIT WAS INITIATED JUST OVER TWO YEARS AGO. TESTIMONY HAS BEEN TAKE ON AND OFF OVER A SEVENTEEN MONTH PERIOD.

Intermittent Monthly

MJB

MILESTONES (Doenner)

Issue of Dec 22, 67

Divorced. ~~The suit~~ Russell A. Firestone Jr., 42, ~~by sweet onetime Schoolteacher~~ onetime Where schoolteacher Mary Alice Sullivan Firestone, 32; on grounds of adultery; after six years of marriage, one son; in West Palm Beach, Fla. ~~During their seven-month divorce trial, almond-eyed,~~ The seven-month trial the ~~brunette Mary Alice, and her millionaire husband and over 100 witnesses testified~~ produced enough testimony of extra-marital adventures on both sides, said the judge, "to make ~~to such an extramarital epic that, as Circuit Judge James R. Knott observed,~~ ~~if everyone could be believed~~ which Knott doubted--Wifey's amours "would have made Dr. Freud's hair curl," while Russ ~~must have~~ "bounded from one bed partner to another with the erotic zest of a satyr."

Heir to the Texas fortune by

Plaintiff's Exhibit 9

537

BEST COPY AVAILABLE

MILESTONES (Doerner) Sat.12/16 com

DEC 22 1967

Divorced. By Russell A. Firestone Jr., 41, heir to the tire fortune: his third wife, a Palm Beach Mary Alice Sullivan Firestone, 32, onetime schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."

Plaintiff's Exhibit 10

538

Plaintiff's Exhibit 11

(Letterhead of)
LAW OFFICES
FARISH & FARISH
DENCO BUILDING
316 First Street
West Palm Beach, Florida
33402

December 26, 1967

REGISTERED MAIL
RETURN RECEIPT REQUESTED
DELIVER TO ADDRESSEE ONLY

TIME, INC.
Rockefeller Center
New York, New York 10020

Attention: Mr. James A. Linen,
President

Gentlemen:

This is to advise you that the undersigned represent Mrs. Mary Alice Sullivan Firestone, whose address is 236 Pendleton Avenue, Palm Beach, Florida. Your particular attention is called to an article appearing in TIME under the date of December 22, 1967, on page 77, under the heading *Milestones,* in which the following appears:

> Divorced. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced

enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."

Mrs. Firestone alleges that a portion of the above quoted, to-wit: "Divorced. By Russell A. Firestone Jr., heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery", is false, malicious and defamatory.

This notice is given to you in compliance with §§ 770.01 and 770.02, Florida Statutes, and is a condition precedent to an action or prosecution for libel against you committed in the State of Florida, and our client has been damaged and injured thereby.

Very truly yours,

FARISH & FARISH

By .....

MJAY:CN

Plaintiff's Exhibit 12

(Letterhead of)
LAW OFFICES
FARISH & FARISH
DENCO BUILDING
316 First Street
West Palm Beach, Florida
33402

January 16, 1968

REGISTERED MAIL
RETURN RECEIPT REQUESTED

TIME, INC.
Rockefeller Center
New York, New York 10020

Attention: Mr. James A. Linen,
President

Gentlemen:

This is to advise you that the undersigned represent Mrs. Mary Alice Sullivan Firestone, whose address is 236 Pendleton Avenue, Palm Beach, Florida. Your particular attention is called to an article appearing in TIME under the date of December 22, 1967, on page 77, under the heading *Milestones,* in which the following appears:

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This notice is given to you in compliance with §§ 770.01 and 770.02, Florida Statutes, and is a condition precedent to an action or prosecution for libel against you committed in the State of Florida, and our client has been damaged and injured thereby.

Very truly yours,

FARISH & FARISH

By MARTIN J. A. YEAGER

MJAY:CN

A071ME

Firestone Divorce 250

WEST PALM BEACH, Fla. AP - Millionaire industrial heir Russell A. Firestone Jr. was granted a divorce Friday from his third wife, a former West Palm Beach school teacher he had accused of adultry and extreme cruelty.

Circuit Court Judge James R. Knott, in entering the decree, awarded Mary Alice Firestone, 22, custody of the couple's 5-year-old son, Mark, and ordered Firestone to make monthly payments of $2,000 for alimony and $750 for child support.

Mrs. Firestone, who filed a suit for separate maintenance prior to the divorce action initiated by Firestone, had sought monthly payments of $5,700.

They were married Aug. 1, 1961, in New York City. Their suits indicated the couple separated in October 1964.

In his decree, Judge Knott said he was "inclined to discount much" of the testimony presented in support of the divorce action.

"According to certain testimony in behalf of the defendant Firestone , extramarital escapades of the plaintiff Mrs. Firestone were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr," Judge Knott said.

The decree ended a stormy, scandal-ridden divorce battle that broke open during their 1965 trial. More than 100 witnesses were summoned for the trial, including nobility, police, private detectives and socialites.

Judge Knott also awarded Mrs. Firestone the couple's home in Palm Beach, but denied her request to retain ownership of race horses, furniture and insurance benefits from a stolen ring valued at $220,000.

EJ35-pes Dec. 15

Defendant's Exhibit 1

543

TELEPHONE #3214 RECORD #3 11:25 /

DECEMBER 82, 1967

Nadasdy

FROM: DICK DUNCAN, MIAMI

TO: APPLEGATE

FOR: MILESTONES: FIRESTONE DIVORCE

RUSSELL A. FIRESTONE JR. AND MARY ALICE FIRESTONE GOT THEIR DIVORCE IN PALM BEACH FRIDAY. FIRESTONE, 41, FORTY ONE, AND MARY ALICE, 32, THIRTY TWO, HAD BEEN TRYING FOR A DIVORCE FOR SEVENTEEN MONTHS. RUSSELL WANTED DIVORCE, SHE WANTED SEPARATE MAINTENANCE. JUDGE JAMES KNOTT COMMENTED: "ACCORDING TO CERTAIN TESTIMONY IN BEHALF OF THE DEFENDANT (RUSSELL), EXTRA MARITAL ESCAPADES OF THE PLAINTIFF WERE BIZARRE AND OF AN AMATORY NATURE WHICH WOULD HAVE MADE DR. FREUD'S HAIR CURL. OTHER TESTIMONY, IN THE PLAINTIFF'S BEHALF, WOULD INDICATE THAT THE DEFENDANT WAS GUILTY OF BOUNDING FROM ONE BED PARTNER TO ANOTHER WITH THE EROTIC ZEST OF A SATYR."

THE JUDGE RULED: "IT IS ABUNDANTLY CLEAR FROM THE EVIDENCE OF MARITAL DISCORD THAT NEITHER OF THE PARTIES HAS SHOWN THE LEAST SUSCEPTIBILITY TO DOMESTICATION, AND THAT THE MARRIAGE SHOULD BE DISSOLVED."

MARY ALICE GETS CUSTODY OF THE SON, MARK ALLEN, FOUR. SHE GETS THREE THOUSAND DOLLARS A MONTH ALIMONY AND SEVEN FIFTY A MONTH CHILD SUPPORT. SHE ALSO GETS A FIFTY THOUSAND DOLLAR FEE FOR HER LAWYER FROM FIRESTONE. CHASING OTHER DETAILS AND WILL UPDATE.

MM

Defendant's Exhibit 2

544

BEST COPY AVAILABLE

Firestone Heir Sheds 3d Wife

West Palm Beach, Fla., Dec. 15 (Special)—The stormy, scandal-ridden divorce trial of millionaire Russell A. Firestone Jr. ended today when the rubber and oil heir was granted a divorce from his third wife, a statuesque onetime West Palm Beach schoolteacher, who had been accused of adultery.

Palm Beach County Circuit Court Judge James R. Knott awarded Mary Alice Firestone, 32, custody of the couple's son, Mark, 5, and ordered Firestone, 42, to make monthly payments of $3,000 for alimony and $750 for child support.

Commenting on spicy testimony that punctuated the seven-month trial, in which more than 100 persons testified, Knott said:

"According to certain testimony in behalf of the defendant (Firestone), extramarital escapades of the plaintiff (Mrs. Firestone) were bizarre and of an amatory nature which would have made Dr. Freud's hair curl.

"Other testimony, in plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr."

"Inclined to Discount Much"

While he was "inclined to discount much" of the testimony, Knott refused to grant Mrs. Firestone's demand for monthly payments of $8,700 she had sought in a suit for separate maintenance.

They were married Aug. 1, 1961, in New York City's Riverside Church after Firestone, grandson of tire magnate Harvey Firestone and an oil millionaire in his own right, proposed to sultry Mary Alice on their first date.

Mary Alice Firestone—gets custody, alimony.

Private detectives for Mrs. Firestone asserted at one point in the trial that Firestone, divorced twice previously, had spent the night with an ex-wife at a house in Fort Lauderdale.

At another hearing in November 1966 a picture was introduced purportedly showing Firestone in a compromising situation with a former secretary.

Last February two detectives testified that Firestone spent one New Year's Eve with an attractive divorcee, Mrs. Myrna Odell, at his West Palm Beach mansion. Mrs. Odell took the stand to deny Mrs. Firestone's charge of sexual promiscuity between her and Firestone.

The divorce action was initiated by Firestone in July 1966. The first hearing was held in November 1966. Final arguments were heard last May 10.

Diamond Worth $250,000

The dimpled, sloe-eyed Mary Alice Sullivan reportedly attempted suicide in April 1964, three months after she was injured in an auto accident. In November 1964 she was declared mentally incompetent shortly after the couple separated. A year later, she was ruled mentally competent and the divorce suit followed.

As Mary Alice told THE NEWS society editor Nancy Randolph two years ago, her marriage to the handsome Firestone was hardly planned. A friend called her to say a couple of pals were looking for dates and would she oblige.

Her friend was insistent and her date turned out to be Firestone. "Funny thing, Russ told me that night he wanted to marry me," she recalled. The convincer came seven months later—a 27-carat, pear-shaped diamond ring worth $250,000.

Defendant's Exhibit 3

545

BEST COPY AVAILABLE

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Motion for Directed Verdict

Comes now the Defendant TIME, INC., and moves this Court for a directed verdict in its behalf. In support of said motion, the Defendant relies on each of the following alternative grounds:

1. That the Plaintiff has failed under the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the Constitution of the State of Florida, specifically Article 1, Section 4 thereof, to prove with convincing clarity that the publication complained of in this action was false.

2. That the Plaintiff has failed, under the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the Constitution of the State of Florida, specifically Article 1, Section 4 thereof, to prove with convincing clarity that the individuals responsible for the publication complained of in this action were guilty of "actual malice."

3. That the Plaintiff has failed, under the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the Constitution of the State of Florida, specifically Article 1, Section 4 thereof, to prove

with convincing clarity that the individuals responsible for the publication complained of in this action knew that the publication was false at the time of publication or that said individuals published said article with serious doubts as to its truth.

4. That the Plaintiff has failed, under the Constitution of the United States specifically the First and Fourteenth Amendments thereto and the Constitution of the State of Florida, specifically Article 1, Section 4 thereof, to prove any actual damages arising from the publication complained of in this action.

5. That the Plaintiff has failed to prove that the publication complained of in this action was libelous.

6. That the evidence in this case affirmatively shows that the article complained of in this action has no different effect as published than the exact words of the final decree of divorce.

7. That the Plaintiff has failed to prove that the article complained of in this action was false.

8. That the evidence in this case affirmatively shows that the article complained of in this action is true.

9. That the article complained of in this action is qualifiedly privileged, and the Plaintiff has failed to prove that the Defendant was guilty of actual malice in its publication.

10. That the evidence in this case affirmatively shows that the article complained of in this action was taken from the report of a reputable news service and the Plaintiff has failed to prove that the Defendant was guilty of wantonness, recklessness or carelessness in its publication.

11. That there is no cause of action in this case under either the common law, the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, or the Constitution of the State of Florida, specifically Article 1, Section 4 thereof, since Plaintiff has withdrawn her claim of injury to reputation thereby conceding that her reputation has not been injured and damages in this case can only flow from injury to reputation.

WHEREFORE, for the foregoing alternative grounds the Defendant moves for a directed verdict.

DATED this 15th day of July, 1970.

Respectfully submitted,

FRATES, FAY, FLOYD & PEARSON
Twelfth Floor Concord Building
Miami, Florida 33130
Attorneys for Defendant

By s/ WM. S. FRATES

Of Counsel:

Harold R. Medina, Jr.
Cravath Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Charges Requested By Plaintiff

2.1. Members of the jury, I shall now instruct you on the law you must follow in reaching your verdict. It is your duty as jurors to consider and weigh the evidence, to decide the disputed issues of fact, and to apply the law to the facts as you find them from the evidence.

2.2. In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness; his intelligence, his interest, if any, in the outcome of the case; the means and opportunity he had to know the facts about which he testified; his ability to remember the matters about which he testified; and the reasonableness of his testimony, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

2.4. In your deliberations, you are to consider three distinct claims. They are:

1. Whether or not the Defendant, Time, Inc., falsely published an article imputing unchastity to the Plaintiff, or by its publication, falsely published that a Court of competent jurisdiction had found her guilty of conduct which amounts to a crime. Adultery is a crime.

2. Whether or not the Plaintiff, Mary Alice Firestone, was damaged by this publication and therefore should receive compensatory damages under the law that I will subsequently give to you.

3. Whether or not under the law that I will give you subsequently, Time, Inc. should respond in punitive damages by reason of this publication.

Although these claims for compensatory damages and punitive damages have been tried together, each is separate from the other and both parties are entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately as you would had each claim been tried before you separately.

3.1. I charge you, gentlemen of the jury, as a matter of law, that the article as published by the Defendant herein was libelous per se.

3.7. If the greater weight of the evidence does not support the claims of the Plaintiff, then your verdict should be for the Defendant. If, however, the greater weight of the evidence does support the claims of the Plaintiff, then you should consider the defenses raised by the Defendant.

(Presumably, the Defendant will set forth 3.8, its defenses)

If the greater weight of the evidence supports either defense of the Defendant, then your verdict should be for the Defendant. If, however, the greater weight of the evidence does not support the defenses of the Defendant, and the greater weight of the evidence does support the claim of Mrs. Firestone, then your verdict should be for Mrs. Firestone.

3.9. Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in this case.

(1) I charge you, gentlemen of the jury, that one who falsely and without privilege to do so, publishes a slander which imputes to another conduct constituting a criminal offense is liable to the other if the offense charged is of a type which, if committed in the place of publication, would be (a) chargeable by indictment or its modern equivalent, and (b) punishable by imprisonment. The publication that a person was found guilty of adultery is a criminal offense under this charge. Restatement, Law of Torts, 1938, Chapter 24, § 571, p. 171. Lemoine vs. Spicer (Fla. 1941) 1 So. 2d 730

(2) At the time of this publication, there was in full force and effect Florida Statute 798.01, which prescribed in its material parts:

> "Whoever lives in an open state of adultery shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding $500.00. Where either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense provided for in this section."

(3) Florida Statute 798.02, which was in full force and effect at the time of this publication, reads in its material parts:

> "If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and

> lascivious behavior, they shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding $300.00."

(4) It is not necessary in order for you to find punitive damages in this case that the Plaintiff prove express malice.

Ill will, hostility, an intention to defame or injure, wantonness or outrageousness of the publication, as well as a publication in reckless disregard of whether true or not may be the equivalent or alternative of express malice. *Brown* vs *Fawcett Publication, Inc.,* PCA 2d 1967, 196 So. 2d 465. *Time* vs *Sullivan* 95 ALR 2d 412. *Reaves* vs *Foster* (Miss. 1867) 200 So. 2d 453.

(5) I charge you, gentlemen of the jury, that should you conclude that this Defendant entertained serious doubts as to the truth of this publication and that it nevertheless published this article, you may consider the question that the article was published with reckless disregard for the truth or falsity, thus demonstrating actual malice. *St. Amant* vs. *Thompson,* 88 S. Ct. 1323 (1968)

(6) I further charge you, gentlemen of the jury, that it is libel per se to charge a woman with unchastity. This is for the reason that such words tend to expose her to public ridicule, scorn, hatred, distrust, or contempt. Unchaste means the opposite of innocence of unlawful sexual intercourse. Chaste primarily implies a refraining from acts or even thoughts or desires that are not virginal or not sanctioned by marriage vows; it may imply avoidance of anything that cheapens or debases. Unchaste is the opposite, or antonym, of that definition. Webster's Seventh New Collegiate Dictionary, Published G & C Merriam Company, copyright 1961.

(7) I charge you that adultery under the divorce laws of this state consist of sexual intercourse by a man, married or single, with a married woman not his wife. 1 Fla. Jur., Adultery and Fornication, § 12.

(8) I charge you, gentlemen of the jury, that any written language published of a person which tends to degrade her, to destroy the confidence of her neighbors in her integrity, or to cause other like injury to her, is actionable per se .

Therefore, if you find that the publication imputed to Mrs. Firestone a criminal offense, or if you find that such article imputed to Mrs. Firestone a charge of unchastity on her part, or if you find that the publication tended to degrade Mrs. Firestone, to bring her into ill repute, to destroy the confidence of her neighbors in her integrity, or to cause other like injury to her, then, so far as compensatory damages are concerned, these in law are presumed without necessity of proof.

The reason for this is that:

> "Any person who has suffered injury by reason of a wrongful and unprivileged communication of a libel, has a right to recover damages. Compensatory damages for this defamation include (1) pecuniary loss, direct or indirect, or special damages, (2) dam ages for mental suffering . . . General damages are those that the law presumes must naturally, proximately, and necessarily result from publication of libelous matter. They are designed to compensate for loss arising from injured feelings, mental suffering and anguish and personal and public humiliation consequent upon the malicious publication of the false and libelous matter." 20 Fla. Jur., Libel and Slander, § 88.

(9) 6.12. Punitive damages. If you find for Mrs. Firestone and find also that the Defendant, Time, Inc. acted with malice, moral turpitude, wantonness, wilfulness or reckless indifference to the rights of others, you may, in your discretion, assess punitive damages against Time, Inc. as punishment and as a deterrant to others. If you find that punitive damages should be assessed against Time, Inc. you may consider the financial resources of such Defendant in fixing the amount of such damages.

(10) I charge you, gentlemen of the jury, that a false charge is nonetheless libelous because another is credited with its authorship. *Taylor* vs. *Tribune Publishing Co.*, Fla. 1914, 65 So. 3. Restatement, Law of Torts, § 582, p. 217, "When one person repeats a defamatory statement which he attributes to some other person, it is not enough for the person who repeats it to prove that the statement was made by the other person. He must prove the truth of the defamatory charges which he has thus repeated."

(11) While it is unnecessary that the report of a judicial proceeding be exhaustive and complete, it is necessary that nothing be omitted or replaced in such a manner as to convey an erroneous impression to those who read it. Restatement, Law of Torts, Vol. 3, § 611.

(12) I further charge you, gentlemen of the jury, that so far as the defense of truth as asserted by the Defendant is concerned, the Defendant has the burden of showing not only that the statement published was true, but it was published for good motives. 20 Fla. Jur., Libel and Slander, § 56, at page 578.

(13) I charge you, gentlemen of the jury, that while the publication of a report of a judicial proceeding is privileged, the report of such judicial proceeding must be accurate and complete or a fair abridgement of such proceeding and not made solely for the purpose of causing harm to

the person defamed. Restatement, Law of Torts, Vol. 3, § 611.

(14) In considering the damages to Mrs. Firestone, should you find that the Defendant's publication was libelous per se, you should consider those damages which the law presumes must naturally, proximately and necessarily result from the publication of libelous matter. They are designed to compensate loss arising from (1) injured feelings, (2) mental suffering and anguish, and (3) personal and public humiliation consequent upon malicious publication of false and libelous matters. 20 Fla. Jur., Libel and Slander, § 88, pp. 610 and 611.

(15) I charge you, gentlemen of the jury, that the defense of truth as justification must be as broad as the alleged libel and must establish the truth of the precise charge made in the publication. Crane vs. New York World Telegram Corp., 126 N. E. 2d 753, 52 A. L. R. 2d 1169.

(16) Failure of the Defendant, Time, Inc. to print a retraction after receiving notice that its article was false and defamatory to the Plaintiff may be considered by you as evidence of actual malice on the part of Time, Inc. Metropolis Co. vs. Croasdell, (Fla. 1941), 199 So. 568.

(17) I charge you, gentlemen of the jury, that one who is liable to another for a libel . . . is liable also for emotional distress resulting therefrom which is proved to have been caused by the defamatory publication or, in the absence of such proof, for such emotional distress as normally results from a publication. Restatement, Law of Torts, Chapter 27, "Defamation: Measure of Damages", § 623, pp. 318 and 319.

(18) The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said

statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state. F. S. A. 2.01.

Respectfully submitted,

ROBERT M. MONTGOMERY, JR.
ROBERT M. MONTGOMERY, of
Howell, Kirby, Montgomery & D'Aiuto
P. O. Box 149
West Palm Beach, Florida 33402
Attorneys for Plaintiff

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Defendant's Requested Jury Instructions

The defendant, TIME, INC., hereby requests that the Court instruct the jury in accordance with the following numbered instructions, to-wit: numbers 1 through 15.

FRATES FAY FLOYD & PEARSON
Twelfth Floor Concord Building
Miami, Florida 33130
Attorneys for Defendant.

By s/ WM. S. FRATES

No. 1 Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to consider and weigh the evidence, to decide the disputed issues of fact, and to apply the law to the facts as you find them from the evidence. Florida Standard Jury Instructions 2.1.

No. 2 In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying; his frankness or lack of frankness; his intelligence; his interest, if any, in the outcome of the case; the means and opportunity he had to know the facts about which he testified; his ability to remember the matters about which he testified; and the reasonableness of his testimony, considered in the light of the evidence in the case and in the light of your own experience and common sense. Florida Standard Jury Instructions 2.2.

No. 3 This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respector of persons; all persons including corporations, partnerships, unincorporated associations and other lawful organizations, stand equal before the law and are to be dealt with as equals in a court of justice.

No. 5 The Court has determined as a matter of law that Time, Inc. is entitled to constitutional guarantees in this case. Consequently before the plaintiff can recover she must establish with convincing clarity that Time, Inc. was guilty of actual malice. Actual malice in this context means that Time, Inc. publis'ed a defamatory falsehood with knowledge that it was false or with reckless disregard of whether it was false or not.

Reckless conduct is not to be measured by whether a reasonably prudent man would have published it or would have investigated it before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. *New York Times* vs. *Sullivan,* 376 U. S. 254 (1964); *St. Amant* vs. *Thompson,* 390 U. S. 727 (1968).

No. 6 "Convincing clarity" means that the evidence must be so clear as to leave no substantial doubt in your mind to the contrary.

No. 7 I instruct you as a matter of law that at the time of this publication, Robert DeLaney was not an employee of Time, Inc. and Time, Inc. is not responsible for his actions unless they knew that his dispatches were false or had serious doubts as to the truth of his dispatches.

No. 8 I instruct you that it is only the knowledge of those who have the responsibility to make the decision to publish which is relevant. They are the ones who must be shown by convincing clarity to have knowledge of falsity or serious doubts as to the truth of the publication. *New York Times* vs. *Sullivan,* 376 U. S. 254 (1964); *Associated Press* vs. *Walker,* 388 U. S. 130 (1967).

No. 9 I instruct you that merely negligent or careless misstatement of the facts does not entitle the plaintiff to recover in this case. There must be shown to be an intent to injure through falsehood. *Time, Inc.* vs. *Hill,* 385 U. S. 374 (1967); *All Diet Foods Distributors* vs. *Time, Inc.,* 290 N. Y. S. 2d 445.

No. 10 I instruct you that failure to retract the publication in this case does not constitute actual malice. *New York Times* vs. *Sullivan,* 376 U. S. 254 (1964); *New York Times* vs. *Conner,* 365 F. 2d 567 (5th Cir. 1966).

No. 11 I instruct you that as a matter of law, Time, Inc. is not guilty of libel for publishing an ordinary news item even if false if it was received from a reputable source and believed to be true when published. *Layne* vs. *Tribune Co.*, 108 Fla. 177, 146 So 234 (1933); *MacGregor* vs. *Miami Herald Pub. Co.*, 119 So 2d 85 (1960); *Associated Press* vs. *Walker*, 388 U. S. 130 (1967).

No. 12 As I have previously instructed you, the Court has determined that Time, Inc. is entitled to constitutional guarantees in this case. The reason for such determination is based on the law that recognizes the principle that discussion on matters of public interest should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on the people involved. *New York Times Co.* vs. *Sullivan*, 376 U. S. 254 (1964); *Gibson* vs. *Maloney*, 231 So 2d 823 (1970).

No. 13 If you find for the defendant, you will not consider the matter of damages. But, if libel is proven with convincing clarity which caused actual damage to the plaintiff, you should award the plaintiff an amount of money that will fairly and adequately compensate her for such damages, including any such damage as she is reasonably certain to experience in the future.

It is only actual damages which are a direct and natural result of the alleged libel which may be recovered. If you find the plaintiff is entitled to recover damages you may consider any loss of reputation, shame, mortification or hurt feelings experienced in the past or to be experienced in the future, if any, which you find from the evidence. There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in the light of the evidence.

No. 14 Your verdict must be based on the evidence that has been received and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party. Florida Standard Jury Instruction 7.1

No. 15 When you retire to the jury room, you should select one of your number to act as foreman to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given forms of verdict, which I shall now read to you:

When you have agreed on your verdict, the foreman, acting for the jury, should date and sign the appropriate form of verdict. You may now retire to consider your verdict. Florida Standard Jury Instruction 7.2

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Additional Defendant's Requested Jury Instructions

Following the hearing on Friday, July 10th, this Court entered its Order ruling that the doctrine of *New York Times Co.* vs. *Sullivan* was not applicable to this case. In

view of that ruling, and not waiving the defendant's position that the said doctrine does govern this case, the defendant submits the following additional requested instructions annexed hereto, numbered 16 through 30.

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Twelfth Floor Concord Building
Miami, Florida 33130
Attorneys for Defendant

By s/ WM. S. FRATES

Of Counsel:

Harold R. Medina, Jr.
Cravath Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

No. 16 I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the publication complained of was substantially true. *Cooper* vs. *Miami Herald Pub. Co.,* 31 So 2d 382 (1947).

No. 17 The Court has determined as a matter of law that this publication was qualifiedly privileged. Consequently, before the plaintiff can recover she must establish that Time, Inc. published the report with malice. Malice in this contest means that Time, Inc. published the report with an evil intent or improper motive arising from spite, ill will or hatred. *Re Hayes,* 72 Fla. 558, 73 So 362 (1916); *Coogler* vs. *Rhodes,* 38 Fla. 240, 21 So 109 (1896); *Abraham* vs. *Baldwin,* 52 Fla. 151, 42 So 591 (1906).

No. 18 I instruct you that as a matter of law, Time, Inc. is not guilty of libel for publishing a report of a judi-

cial decree even if false if at the time of the publication it was reasonably believed true and was published for good motives. *Coogler* vs. *Rhodes,* 38 Fla. 240, 21 So 109 (1896); *Leonard* vs. *Wilson,* 150 Fla. 503, 8 So 2d 12 (1942).

No. 19 No newspaper or news magazine can insure the absolute authenticity of every item of news it publishes, nor can it assume in advance the burden of specifically verifying every item of news reported to it by established news gathering agencies. If it had to do so, it could not continue to discharge with efficiency and promptness the demands of modern dissemination of news. Accordingly, a publisher is not guilty for publication of a report from an established news gathering agency, even if false, unless the publisher itself was guilty of wantonness, recklessness or carelessness in its publication.

It is the plaintiff's burden to prove such misconduct on the part of Time, Inc. by the greater weight of the evidence. *Layne* vs. *Tribune Co.,* 146 So 234 (1933); *MacGregor* vs. *Miami Herald Pub. Co.,* Fla., 119 So 2d 85 (1960).

No. 20 The mere publication of a report from a generally recognized reliable news source, such as the Associated Press, will not render Time, Inc. guilty in damages to the plaintiff, even if the report is false, unless Time, Inc. was itself guilty of wantonness, recklessness or carelessness in its publication.

It is the plaintiff's burden to prove such misconduct on the part of Time, Inc. by the greater weight of the evidence. *Layne* vs. *Tribune Co.,* 146 So 234 (1933); *MacGregor* vs. *Miami Herald Pub. Co.,* Fla., 119 So 2d 85 (1960).

No. 21 The Court instructs you that the burden of proving damages rests upon the plaintiff. She is required to prove each item of damage claimed by the greater weight of the evidence and, if she fails in this respect as to any

particular item of damage, then she cannot recover anything for such item.

No. 22 The plaintiff is not entitled to recover damages based upon mere speculation and conjecture. The only damages recoverable in this action are those that are actually proved by the greater weight of the evidence to have come about as a direct and proximate result of the publication complained about in this case. *Miami Herald Pub. Co* vs. *Brown,* 66 So. 2d 679 (1953).

No. 23 The fact that I have charged you on the subject of damages is not to be taken by you as any indication of the Court's views as to whether or not there should be any recovery by the plaintiff at all. I have instructed you concerning damages only because the law requires that I instruct you on all the principles of law governing this case, including the subject of damages.

No. 24 I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce decree in the case of *Firestone* v. *Firestone,* Case No. 64 C 2790C. *McCormick* v. *Miami Herald Publishing Co.,* 139 So 2d 197 (2nd DCA 1962).

No. 25 I instruct you that the plaintiff is not making any claim in this case for injury to her reputation or for injury to any business, occupation or employment, or for any physical pain or inconvenience, or for any pecuniary loss.

No. 26 I instruct you that the court has determined as a matter of law that the final decree of divorce in the case *Firestone* v. *Firestone,* Case No. 64 C 2790C, was granted on the grounds of adultery and extreme cruelty.

No. 27 I instruct you that a reasonable interpretation of the final decree of divorce in the case of *Firestone* v. *Firestone,* Case No. 64 C 2790C, was that one of the grounds for divorce was adultery.

No. 28 I instruct you that at the time of the plaintiff's divorce adultery and extreme cruelty were grounds for divorce under the laws of Florida. I further instruct you that lack of "domestication" or lack of "domesticity" was not a ground for divorce under Florida law.

No. 29. I instruct you that merely negligent or careless misstatement of the facts does not entitle the Plaintiff to recover in this case. Actual malice on the part of Time, Inc., must be shown.

No. 30 Defendant requests the Court to instruct the jury, in substance, as follows:

In actions of this character, proof of the truth of the publication complained of is a complete defense. The test that you must use in determining whether or not the publication is true is to see whether the facts proved to be true would have the same effect on the mind of the average reader as the facts published. If you find that the average reader would have been affected by the actual facts the same way as by the statement published, then your verdict must be for defendant. *Fleckenstein* v. *Friedman,* 266 N. Y. 19 (1934); *Cafferty* v. *Southern Tier Publishing Co.,* 226 N. Y. 87 (1919).

In *Cafferty* v. *Southern Tier Publishing Company,* 226 N. Y. 87 (1919), in upholding a complete defense of truth, the Court said (p. 93):

> "The libel law is not a system of technicalities, but reasonable regulations whereby the public may be furnished news and information, but not false

stories about any one. When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done."

Again in the leading case of *Fleckenstein* v. *Friedman,* 266 N. Y. 19 (1934), the Court said (p. 23):

> "This is attacked for lack of breadth and for failure to be direct and explicit. Appellant says, moreover, that while it unquestionably refers to definite acts, it is vague in particularity. No innuendo is pleaded, but it is argued here that the sting of the libel is in depicting plaintiff as striking contemptibly, slyly and with crafty artfulness while the backs of the officials were turned. That is a matter for the determination of the jury. It might very well be said that the sting abided in the rather obvious charge that plaintiff was a player with a mean streak —a sadistic bully—and that the balance of the article illustrated the charge. Even if we accept plaintiff's view, it still seems to us a jury might well say that the justifying facts mean the same thing. *A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.* 'When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.' (*Cafferty* v. *Southern Tier Pub. Co.,* 226 N. Y. 87, 93.)" [Italics added.]

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Verdict

West Palm Beach, Florida
July , 1970

We, the jury, find for the Plaintiff, MARY ALICE FIRESTONE, and against the Defendant, TIME, INC., and assess her compensatory damages in the sum of $100,000.

We further find for the Plaintiff, MARY ALICE FIRESTONE, and against the Defendant, TIME, INC., and assess punitive damages against TIME, INC. in the sum of $0.

So say we all.

ADOLF M. SHAPIRO
Foreman

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Motion for Directed Verdict

The defendant, TIME, INC., pursuant to Florida Rule of Civil Procedure 1.480, moves this Court to have the

jury's verdict set aside and to have judgment entered in favor of the defendant in accordance with its motion for directed verdict. In support of said motion the defendant relies on each of the following alternative grounds:

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the evidence.

3. That the verdict is contrary to the law and the evidence.

4. That the verdict is contrary to the manifest weight of the evidence.

5. That the plaintiff has failed, under the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the Constitution of the State of Florida, specifically Article 1, Section 4 thereof, to prove with convincing clarity that the individuals responsible for the publication complained of in this action knew that the publication was false at the time of publication or that said individuals published said article with serious doubts as to its truth.

6. That the plaintiff has failed, under the Constitution of the United States, specifically the First and Fourteenth Amendments thereto and the Constitution of the State of Florida, specifically Article 1, Section 4 thereof, to prove any actual damages arising from the publication complained of in this action.

7. That the plaintiff has failed to prove that the publication complained of in this action was libelous.

8. That the evidence in this case affirmatively shows that the article complained of in this action has no different effect as published than the exact words of the final decree of divorce.

9. That the plaintiff has failed to prove that the article complained of in this action was false.

10. That the evidence in this case affirmatively shows that the article complained of in this action is true.

11. That the article complained of in this action is qualifiedly privileged, and the plaintiff has failed to prove that the defendant was guilty of actual malice in its publication.

12. That the evidence in this case affirmatively shows that the article complained of in this action was taken from the report of a reputable news service and the plaintiff has failed to prove that the defendant was guilty of wantonness, recklessness or carelessness in its publication.

13. That there is no cause of action in this case under either the common law, the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, or the Constitution of the State of Florida, specifically Article 1, Section 4 thereof, since plaintiff has withdrawn her claim of injury to reputation thereby conceding that her reputation has not been injured and damages in this case can only flow from injury to reputation.

WHEREFORE, for the foregoing alternative grounds the defendant moves for a directed verdict.

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Attorneys for defendant.

By s/ WM. S. FRATES

(Certificate of service omitted in printing.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Motion for New Trial

The defendant, TIME, INC., pursuant to Florida Rule of Civil Procedure 1.530 and as an alternative to its motion for a directed verdict, moves this Court for the entry of a new trial in its behalf. In support of said motion the defendant relies on each of the following alternative grounds:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is contrary to the manifest weight of the evidence.

5. The Court erred in ruling at a pre-trial conference on Friday, July 10, 1970, as stated in its order dated July 13, 1970, that "this case does not fall within the holding of *Times vs. Sullivan*".

6. The Court erred in failing to give defendant's requested charge #5 and/or defendant's requested charge #6 and/or defendant's requested charge #7 and/or defendant's requested charge #8 and/or defendant's requested charge #9 and/or defendant's requested charge #10 and/or defendant's requested charge #11 and/or defendant's requested charge #12.

7. The Court erred in failing to give defendant's requested charge #17 and/or defendant's requested charge #18 and/or defendant's requested charge #29.

8. The Court erred in failing to give defendant's requested charge #19 and/or defendant's requested charge #20.

9. The Court erred in failing to give defendant's requested charge #3 and/or defendant's requested charge #21 and/or defendant's requested charge #22 and/or defendant's requested charge #23 and/or defendant's requested charge #25 and/or defendant's requested charge #26 and/or defendant's requested charge #27.

10. The Court erred in giving plaintiff's requested charge #1 as amended.

11. The Court erred in giving plaintiff's requested charge #9.

12. The amount of the verdict for the plaintiff is so great as to shock the judicial conscience or to indicate that the jury must have been unduly swayed by bias, prejudice or passion.

13. This trial was conducted in an atmosphere of prejudice and passion which was produced by plaintiff's attorney's activities in admittedly securing the newspaper articles which have been marked into evidence as defendant's exhibits for identification A, H, I and J.

14. This trial was conducted in an atmosphere of prejudice and passion which was produced by plaintiff's attorney's rebuttal closing argument in that

a. Said attorneys argued grounds for divorce under Florida Statutes in direct violation of the Court's announced rulings.

b. Said attorneys commented on matters not in evidence, to-wit: that the plaintiff had given them the names of 150 witnesses.

c. Said attorneys commented on matters not in evidence, to-wit. that Life magazine had libeled the plaintiff by alleging publishing an article saying that she "bought a witness".

d. Said attorneys' entire argument on damages was for loss of reputation, to-wit: that defendant "convicted" plaintiff in the community and that the plaintiff's son would think less of his mother as a result of this article, when said element of damage had been voluntarily withdrawn from the case and defendant was barred from presenting evidence of the plaintiff's reputation.

15. The Court erred in not advising counsel of the jury's question that was submitted by the jury during its deliberations until after the Court had answered the question.

16. The Court erred in the manner in which it answered the jury's question that was submitted to the Court by the jury during the jury's deliberation.

17. The Court erred in the manner in which it answered the jury's question that was submitted to the Court by the jury during its deliberations in that the Court failed to instruct the jury that there could be no recovery in this case on the basis of what the plaintiff's son may think of

the plaintiff inasmuch as the plaintiff had voluntarily withdrawn her claim for injury to reputation.

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Of Counsel:

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(Certificate of service omitted in printing.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA
Case No. 68 C 977—Smith

MARY ALICE FIRESTONE,
Plaintiff,

vs.

TIME, INC.,
Defendant.

Order

This cause was presented on Defendant's Motion for Directed Verdict and Motion for New Trial. The Court has heard and considered the arguments of counsel and has again studied the memorandums and citations of law furnished the Court from time to time during the progress of this case. No useful purpose would be served by setting out lengthy explanations on points where the Court is merely in disagreement with the position of the Defendant, either as to the effect of evidence or as to the proper application of the law and the results thereof. The Court's consideration of this matter leads it to the conclusion that submission to a jury was proper and therefore Defendant's Motion for a Directed Verdict must be denied.

Defendant asserts 18 grounds for a new trial, some of which are the standard, formal grounds, and others are more specific. Ground five asserts error by the Court in ruling that this case does not fall within the holding of "Times v. Sullivan." In order for that authority to control, the Plaintiff must be a public figure. The Court is still of

the opinion that she is not. The mere fact that she has been frequently referred to in print does not establish her as a "public character" within the meaning of the Times v. Sullivan case. Even if she were, the holding in the case of Pape v. Time, Inc., 419 F. 2d 980 indicates that the instant case was one for the jury.

Grounds six thru 11 complain of the giving, or refusal of certain charges to the jury. The Court has gone over its charge and concludes that it was proper when taken in its entirety. The balance of the motion alleges an atmosphere of prejudice and passion because of certain matters referred to in the closing arguments of Plaintiff's counsel and that the Court did not follow the proper procedure in answering a question submitted by the jury. It is not believed that these points justify granting a new trial.

A comment should be made as to ground 11 of Defendant's Motion for a Directed Verdict which asserts that the article complained of was qualifiedly privileged, and that Plaintiff failed to prove that the Defendant was guilty of actual malice. Publications of judicial proceedings, under the laws of Florida, are qualifiedly privileged *if* they are fair and impartial *and also* accurate in regard to all material matters. In this case, the questions of fairness and accuracy on material matters were, in this Court's opinion, for the jury. It is thereupon,

ORDERED AND ADJUDGED that Defendant's Motion for Directed Verdict and Motion for New Trial be and the same are hereby denied.

DONE AND ORDERED this 8th day of September 1970.

/s/ CULVER SMITH
Culver Smith
Circuit Judge

IN THE

CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL ACTION

No. 68 C 977—Smith

MARY ALICE FIRESTONE,

Plaintiff,

vs.

TIME, INC., etc.,

Defendant.

Final Judgment

After trial by jury, a verdict having been entered for the Plaintiff, Mary Alice Firestone, and against the Defendant, Time, Inc., in the sum of $100,000.00, it is, therefore

ORDERED AND ADJUDGED that Plaintiff have and recover from the Defendant Time, Inc. the sum of $100,000.00, for which let execution issue. Costs to be assessed upon proper motion subsequent to this judgment.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida, this 9th day of September, A. D. 1970.

/s/ CULVER SMITH
Circuit Judge

IN THE

CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL ACTION

[SAME TITLE]

Notice of Appeal

TIME, INC., defendant, takes and enters its appeal to the District Court of Appeal, Fourth District of Florida, to review the order, judgment or decree of the Circuit Court of Palm Beach County, bearing date the 9th day of September, 1970, and rendered and recorded in Circuit Court Minute Book 1837, Page 644, on September 9, 1970. The nature of the order appealed from is a Final Judgment.

All parties to said cause are called upon to take notice of the entry of this appeal.

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By WM. S. FRATES
Attorneys for Defendant

Of Counsel:

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(Certificate of service omitted in printing.)

IN THE

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

[SAME TITLE]

Assignments of Error

The defendant, TIME, INC., by and through its undersigned attorneys, assigns as error on appeal in this action the following:

1. The Court erred in denying the defendant's motion for directed verdict at the close of the plaintiff's case.

2. The Court erred in denying the defendant's motion for directed verdict at the close of the evidence.

3. The Court erred in denying the defendant's motion for directed verdict made following the return of the jury's verdict.

4. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that the plaintiff had failed, under the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the Constitution of the State of Florida, specifically Article I, Section 4 thereof, to prove with convincing clarity that the individuals responsible for the publication complained of in this acton knew that the publication was false at the time of publication or that said individuals published said article with serious doubts as to its truth.

5. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that the plaintiff had failed, under the Constitution of the United States specifically the First and Fourteenth Amenments thereto and the Constitution of the State of Florida, specifically Article I, Section 4 thereof, to prove any actual damages arising from the publication complained of in this action.

6. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that the plaintiff had failed to prove that the publication complained of in this action was libelous.

7. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that the evidence in this case affirmatively shows that the article complained of in this action has no different effect as published than the exact words of the final decree of divorce.

8. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that the plaintiff has failed to prove that the article complained of in this action was false.

9. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that the evidence in this case affirmatively shows that the article complained of in this action is true.

10. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that the article complained of in this action is qualifiedly privileged, and the plaintiff has failed to prove that the defendant was guilty of actual malice in its publication.

11. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that the evidence in this case affirmatively shows that the article complained of in this action was taken from the report of a reputable news service and the plaintiff has failed to prove that the defendant was guilty of wantonness, recklessness or carelessness in its publication.

12. The Court erred in denying the defendant's motions for directed verdict which were based on the ground that there is no cause of action in this case under either the common law, the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, or the Constitution of the State of Florida, specifically Article I, Section 4 thereof, since plaintiff has withdrawn her claim of injury to reputation thereby conceding that her reputation has not been injured and damages in this case can only flow from injury to reputation.

13. The Court erred in denying the defendant's motion for new trial which was based on the ground that the verdict is contrary to the law.

14. The Court erred in denying the defendant's motion for new trial which was based on the ground that the verdict was contrary to the evidence.

15. The Court erred in denying the defendant's motion for new trial which was based on the ground that the verdict is contrary to the law and the evidence.

16. The Court erred in denying the defendant's motion for new trial which was based on the ground that the verdict is contrary to the manifest weight of the evidence.

17. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in ruling at a pre-trial conference on Friday, July 10, 1970, as stated in its order dated July 13, 1970, that "this case does not fall within the holding of *Times* vs. *Sullivan*".

18. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in failing to give defendant's requested charge #5 and/or defendant's requested charge #6 and/or defendant's requested charge #7 and/or defendant's requested charge #8 and/or defendant's requested charge #9 and/or defendant's requested charge #10 and/or defendant's requested charge #11 and/or defendant's requested charge #12, all of which set forth the applicable jury instructions under the doctrine of *Times* v. *Sullivan,* the Court's ruling on the same amounting to a directed verdict on that matter.

19. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in failing to give defendant's requested charge #17 and/or defendant's requested charge #18 and/or defendant's requested charge #29, all of which set forth the applicable jury instructions under the common law doctrine of qualified privilege, the Court's ruling on the same amounting to a directed verdict on that matter.

20. The Court erred in giving over defendant's objection the following instruction on qualified privilege, said charge being an incorrect and incomplete statement of the applicable principles:

> In general, publication of reports of judicial proceedings is qualifiedly or conditionally privileged. In order to be privileged the reports must be not only fair & impartial, but also accurate in regard to material matters. An account of a judicial pro-

ceeding is fair and accurate if reported either literally and completely, or by a condensed summary. Privilege protecting publication of reports of proceedings of judicial bodies includes not only matter of proof and remarks of the Court but also reports of pleadings, orders and judgments as well.

21. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in failing to give defendant's requested charge #19 and/or defendant's requested charge #20, all of which set forth the applicable jury instructions under the doctrine of *Layne* v. *Tribune Co.,* the Court's ruling on the same amounting to a directed verdict on that matter.

22. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in failing to give defendant's requested charge #3 and/or defendant's requested charge #21 and/or defendant's requested charge #22 and/or defendant's requested charge #23 and/or defendant's requested charge #25 and/or defendant's requested charge #26 and/or defendant's requested charge #27.

23. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in giving plaintiff's requested charge #1 as amended.

24. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in giving plaintiff's requested charge #9.

25. The Court erred in denying the defendant's motion for new trial which was based on the ground that the amount of the verdict for the plaintiff is so great as to

shock the judicial conscience or to indicate that the jury must have been unduly swayed by bias, prejudice or passion.

26. The Court erred in denying the defendant's motion for new trial which was based on the ground that this trial was conducted in an atmosphere of prejudice and passion which was produced by plaintiff's attorneys' activities in admittedly securing the newspaper articles which have been marked into evidence as defendant's exhibits for identification A, H, I and J.

27. The Court erred in denying the defendant's motion for new trial which was based on the ground that this trial was conducted in an atmosphere of prejudice and passion which was produced by plaintiff's attorneys' closing argument, for example:

a. Said attorneys argued grounds for divorce under Florida Statutes in direct violation of the Court's announced rulings.

b. Said attorneys commented on matters not in evidence, to-wit: that Life magazine had libeled the plaintiff by alleging publishing an article saying that she "bought a witness".

c. Said attorneys commented on matters not in evidence, to wit: that the plaintiff had given them the names of 150 witnesses.

d. Said attorneys' entire argument on damages was for loss of reputation, to-wit: that defendant "convicted" plaintiff in the community and that the plaintiff's son would think less of his mother as a result of this article, when said element of damage had been voluntarily withdrawn from the case and defendant was barred from presenting evidence of the plaintiff's reputation.

28. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in not advising counsel of the jury's question that was submitted by the members of the jury during their deliberations until after the Court had answered the question.

29. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court denied the defendant, TIME, INC., due process of law with reference to the jury's question that was submitted by the jury during its deliberations by not giving the defendant notice and opportunity to be heard prior to answering said question.

30. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in the manner in which it answered the jury's question that was submitted to the Court by the jury during the jury's deliberation.

31. The Court erred in denying the defendant's motion for new trial which was based on the ground that the Court erred in the manner in which it answered the jury's question that was submitted to the Court by the jury during its deliberations in that the Court failed to instruct the jury that there could be no recovery in this case on the basis of what the plaintiff's son may think of the plaintiff inasmuch as the plaintiff had voluntarily withdrawn her claim for injury to reputation.

32. The Court erred in denying the defendant's timely made motion for new trial.

33. The Court erred in entering its Order of September 8, 1970.

34. The Court erred in entering Final Judgment for the plaintiff on September 9, 1970.

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By s/ WM. S. FRATES

Of Counsel:

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(Certificate of service omitted in printing.)

Opinion and Order of the District Court of Appeal October 28, 1971, Directing Entry of Judgment for Petitioner

TIME, INC., Appellant,

v.

MARY ALICE FIRESTONE, Appellee.

No. 70-802.

District Court of Appeal of Florida,

Fourth District.

Oct. 28, 1971.

Rehearing Denied Dec. 2, 1971.

Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, and William S. Frates and Larry S. Stewart, of Frates, Floyd, Pearson & Stewart, Miami, for appellant.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean & Hallowes, West Palm Beach, for appellee.

WALDEN, *Judge*.

Plaintiff, Mary Alice Firestone, is the ex-wife of the heir to the Firestone rubber fortune. The instant libel action stems from a short article published in Time magazine concerning plaintiff's divorce. The article said plaintiff had been divorced by her husband on grounds of extreme cruelty and adultery.

Plaintiff sued for libel, objecting to the word adultery, because she had received alimony and under Florida Law, F. S. 1967, Section 61.09, F. S. A., an adulterous spouse

may not receive alimony. Plaintiff was awarded $100,000. From that award Time appeals.

Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error we deem it judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine.

The doctrine of constitutional privilege in libel began with a holding that public officials could not be libeled in their public duties without proof of actual malice, *even if the publication was false*. This doctrine was soon expanded to include public figures. The final plateau was reached when the same criteria were held applicable to matters and events of public interest. This last category fits the situation at hand.

1. In capsule, New York Times Company v. Sullivan, 1964, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, established severe constitutional limits on libel actions brought by *public officials*. If the defamatory statement was directed at a public official, and concerned the performance of his public duties, the official could recover for libel only by proving actual malice. Actual malice was defined as knowledge of the falsity of your publication or reckless disregard for its truth.

It soon became apparent, however, that since the qualified privilege of New York Times was a constitutional one founded on the first amendment freedoms of speech and

press (an amendment said to occupy a top place in the hierarchy of the Bill of Rights) it was impossible to limit its application to public officials.

2. In the cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker, 1967, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094, the Supreme Court extended New York Times to include *public figures,* in these cases a football coach and a general with political prominence. Public figures were defined by Pauling v. National Review, Inc., 1966, 49 Misc. 2d 975, 269 N. Y. S. 2d 11, as "a private person who publicly, prominently, actively, and as a leader, thrusts himself (however properly) into a public discussion of public and exceedingly controversial questions." Standards for determining public figures were not exact. Each case was decided on its peculiar facts, each figure deemed public by his peculiar actions. See Cepeda v. Cowles Magazines and Broadcasting, Inc., 1968, 9 Cir., 392 F. 2d 417; Rose v. Koch, 1967, 278 Minn. 235, 154 N. W. 2d 409; Gilberg v. Goffi, 1964, 21 A. D. 2d 517, 251 N. Y. S. 2d 823; Mason v. Sullivan, 1966, 26 A. D. 2d 115, 271 N. Y. S. 2d 314; Dempsey v. Time, Incorporated, 1964, 43 Misc. 2d 754, 252 N. Y. S. 2d 186.

3. The next extension of New York Times began with Time, Inc. v. Hill, 1967, 385 U. S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456. In that case the court applied the Times rule to false reporting of *matters of public interest* in connection with an action for invasion of the right to privacy. In other words, the right to privacy could be invaded if the public interest was great enough. Hill started a flood of public interest cases, Time, Inc. v. McLaney, 1969, 5 Cir., 406 F. 2d 565; Bon Air Hotel, Inc. v. Time, Inc., 1970, 5

Cir., 426 F. 2d 858. The result limited libel verdicts severely.

In sum, in order for a public official, public figure or a person involved in an event of great public interest to succeed in a libel action, actual malice must be proven.

Examples of events in the public interest, events where the public's right to know is superior to the individual's right to collect for damaged reputation include police raids for obscene books, organized crime, garbage pickups, pharmaceutical and laboratory testing, and the Master's Golf Tournament. Rosenbloom v. Metromedia, Inc., 1969, 3 Cir., 415 F. 2d 892; Wasserman v. Time, Inc., 1970, 138 U. S. App. D. C. 7, 424 F. 2d 920; Arizona Biochemical Company v. Hearst Corporation, 1969, D. C. S. D. N. Y., 302 F. Supp. 412; United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 1968, 9 Cir., 404 F. 2d 706; Bon Air Hotel, Inc. v. Time, Inc., supra.

Davis v. National Broadcasting Company, 1970, D. C. E. D. La., 320 F. Supp. 1070, discussed some criteria used in determining if the public interest test is applicable.

> "* * * *A person may become the subject of public interest within the meaning of that rule, although he does not seek to be one, and indeed attempts to avoid it.* Thus, a person called to testify unwillingly before a grand jury, a bystander at an event of public importance, or the family of a public official may well be public figures exposed to public comment that is protected by the privilege.
>
> "Hence, as expounded by the decision in *Bon Air,* the Fifth Circuit Rule is that *a publication about any matter of public interest is within the scope of the Times privilege,* and hence protected,

> absent a showing that the publisher knew that the statement was false or had serious doubt about its accuracy."

Rosenbloom v. Metromedia, Inc., 1971, 403 U. S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296, mentioned earlier in its lower court posture, was affirmed in a landmark United States Supreme Court case codifying with approval the numerous lower court expansions of New York Times to include matters of public interest. We feel this case is dispositive of our position and represents an authoritative codification of the doctrine of constitutional privilege.

The Rosenbloom facts concerned a police raid searching for obscene books. The court said,

> "* * * Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense. 'The guarantees for speech and press are not the preserve of political expression or comment upon public affairs.' Time, Inc. v. Hill, 385 U. S. 374 at 388, 87 S. Ct. 534, 17 L. Ed. 2d 456. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U. S. 88, 102, 60 S. Ct. 736, 744, 84 L. Ed. 1093 (1941)."

* * * *

"Moreover, the constitutional protection was *not* intended to be limited to matters bearing broadly on issues of responsible government. '[T]he Founders

* * * felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government.' Curtis Publishing Co. v. Butts, 388 U. S., at 147, 87 S. Ct. at 1987 (opinion of Harlan, J.)." (Emphasis supplied except for cites.)

* * * *

"* * * The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. * * * *We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern,* without regard to whether the persons involved are famous or anonymous." (Emphasis supplied.)

* * * *

"* * * '[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.' St. Amant v. Thompson, 390 U. S. 727, 732, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with *knowledge that it was false* or *with reckless disregard* of whether it was

false or not. Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech.' Garrison v. Louisiana, 379 U. S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)." (Emphasis supplied except for citations.)

The Supreme Court did not define with exactitude what is in the public interest.

"* * * [w]hether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases." Rosenbloom, supra.

This is a state libel action and it is our delineation that the divorce of Mary Alice Firestone was an event of great public interest. It is even possible plaintiff was a public figure, but we need not go that far to substantiate our result. See Time, Inc. v. Johnston, September 13, 1971, 4 Cir., 448 F. 2d 378, for an interpretation of Rosenbloom's language concerning both public figures and events of great public interest.

The divorce trial in our case lasted seventeen months and there was much notoriety connected with it. Due to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.

The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. The fact that Time decided to publish news of the decree in the limited

space of its Milestones Column is in itself persuasively indicative of its great reader interest.

Given the divorce's inclusion as an event of great public interest, the only remaining question is one of malice. Only by so proving may plaintiff sustain a recovery. We can find no malice.

Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth.

The wording of the divorce decree was ambiguous. At least two reasonable interpretations were available—that plaintiff was found an adulteress as charged in the complaint, or that she was not an adulteress because of the incongruity of such a finding with an award of alimony.

The testimony at trial, some deemed too spicy for public sessions, implicated both parties in compromises to marital fidelity. The wording of the divorce decree itself would lead a reasonable person to conclude adultery had been committed, "[a]ccording to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr." Part of this language was reproduced exactly in Time's article.

In addition to Time's rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to

substantiate information. Plaintiff's attorney and the judge were called for verification.

It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it.

It is this court's conclusion that the judgment appealed from should be reversed. Time clearly falls under the New York Times umbrella of protection. The divorce of Mary Alice Firestone was an event of great public interest. There was no evidence of malice on Time's part.

The judgment is reversed and the cause remanded with instructions to enter a final judgment in favor of the appellant, Time, Inc.

Reversed and remanded.

REED, C. J., and OWEN, J., concur.

Opinion and Order of the Supreme Court of Florida December 20, 1972, Directing the District Court of Appeal Further to Consider the Case

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MARY ALICE FIRESTONE, Petitioner,

v.

TIME, INC., Respondent.

No. 41868.

Supreme Court of Florida.

Dec. 20, 1972.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hallowes, Jacksonville, for petitioner.

William S. Frates and Larry S. Stewart, of Frates, Floyd Pearson, Stewart, Proenza & Richman, Miami, and Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, for respondent.

McNULTY, District Judge.

We review this day a libel action arising out of a publication in the "Milestones" column of Time magazine relating to a divorce between petitioner and her husband. Our jurisdiction is predicated on conflict which will hereinafter appear.

The assailed publication is as follows:

> "Divorced. By Russel A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and *adultery;* after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'" (Italics added)

The truth is, the divorce was *not* granted on the grounds of adultery.[1] Furthermore, there was no express finding in the judgment of divorce that either of the parties was guilty of marital infidelity, although the trial judge did allude to testimony offered in that regard and commented thereon in the language quoted in the article. As to this, however, the article failed to note that the trial judge expressly stated that he was "inclined to discount much of this testimony as unreliable."[2]

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[1]In reviewing the divorce proceeding on certiorari, this court expressly determined that the trial judge "did not find the wife guilty of adultery." Rather, it was pointed out that the divorce was granted for lack of "domestication," in the language of the trial judge, which of course was not one of the statutory grounds at the time of divorce. We affirmed the decree, nonetheless, but on the ground of "extreme cruelty," the record having fully supported such conclusion and thus necessitating an affirmance. Firestone v. Firestone (Fla. 1972), 263 So. 2d 223.

[2]The relevant portion of the final judgment in this regard is set forth as follows:

> "According to certain testimony in behalf of the defendant, extra-marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated. . . ."

In any case, in this libel action the District Court reversed a judgment in favor of plaintiff-petitioner, concluding that because the petitioner's ex-husband was an heir to the immense Firestone rubber fortune, and because their divorce action itself together with sensational predivorce marital difficulties had received nationwide publicity, the foregoing publication was constitutionally protected under the First Amendment of the United States Constitution as being "an event of great public interest" within the rationale of the so-called "New York Times doctrine."[3]

I

The paramount question we must answer, therefore, is whether the publication herein, under the circumstances of its making, is thus constitutionally protected. If it is, then the New York Times standard does apply, viz., assuming a defamatory falsehood, petitioner must prove, with convincing clarity, actual malice, i.e., knowledge of the falsity or a reckless disregard of whether it was false or not.[4] If not constitutionally protected, and again assuming a defamatory falsehood, then the publication herein renders respondent amenable under the Florida common law on the subject, to-wit: that a published defamatory falsehood which is libelous *per se,* unless otherwise privi-

[3]*See,* Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, citing, New York Times v. Sullivan (1964), 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686.

[4]*Id. See, also,* St. Amant v. Thompson (1968), 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262.

leged,[5] is actionable absolutely and no malice need be shown[6]—truth being the only defense.[7]

As noted, the District Court concluded that the publication herein was constitutionally protected and applied the New York Times standard, *supra.* We disagree; and herein lies the predicate for jurisdictional conflict. For it is the conflict of *decisions,* not of *opinions* or *reasons,* which supply jurisdiction for review by certiorari[8]. If, therefore, the District Court erroneously categorized the Firestone divorce action as an event of "great public interest" within the discipline of *New York Times,* and thereby imposed a greater burden on petitioner than would otherwise be the case under settled Florida libel law, then its decision is in conflict with Florida law on the subject which was left unassailed by *New York Times* and its progency *except* to the extent of publication of matters of "great public interest" *as that term is correctly construed.* We are thus faced with circumscribing "matters of great public interest."

[5]*See, e.g.,* Hauser v. Urchisin (Fla. 1970), 231 So. 2d 6 (*absolute* privilege for statement by public official in connection with his duties); St. Paul Fire & Marine Ins. Co. v. Icard, Merrill, Cullis & Timm, P. A. (Fla. App. 1967), 196 So. 2d 219 (*absolute* privilege for statements made *in* judicial proceedings); Walsh v. Miami Herald Publishing Co. (Fla. 1955), 80 So. 2d 669 (*qualified* privilege for reports *of* judicial proceedings); Murphy v. Daytona Beach Humane Soc. (Fla. App. 1965), 176 So. 2d 922 (*qualified* privilege in commenting on matter of public interest); and Leonard v. Wilson (Fla. 1942), 8 So. 2d 12 (*qualified* privilege for good faith character reports or references).

[6]*See, e.g.,* Teare v. Local Union No. 295 (Fla. 1957), 98 So. 2d 79; Hartley & Parker, Inc. v. Copeland (Fla., 1951), 51 So. 2d 789; and Commander v. Petersen (Fla. 1934), 156 So. 337.

[7]*See,* Fla. Const. D. R. § 4, F. S. .A. *See, also,* Florida Pub. Co. v. Lee (Fla. 1918), 80 So. 245.

[8]*See,* Gibson v. Maloney (Fla. 1970), 231 So. 2d 823. *See, also,* Fla. Const., Art. V, § 4(2).

II

To begin with, the term "matters of public or general concern" is more apt, as will become obvious, than the expression "matters of great public interest," and we prefer it. Conceptually, it is public *concern* which clearly underlies the *ratio decidendi* of the entire line of Supreme Court cases beginning with *New York Times;* and the concept was ultimately resolved in Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 91 S. Ct. 1811, 26 L. Ed. 2d 296.[9]

> ". . . It is clear that there has emerged from our cases decided since New York Times the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, The System of Freedom of Expression 531-532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of *public or general concern,* albeit leaving the delineation of the reach of that term to future cases." (Italics ours)

Now, it is implicit in these decisions, terminating with *Metromedia,* that not *all* news items or feature articles are

[9](1971), 403 U. S. 29, 44, 91 S. Ct. 1811, 1820, 29 L. Ed. 2d 296.

constitutionally protected.[10] It must be taken as true, on the other hand, that "newsworthiness" is that which is well calculated to generate wide reader interest and thus may be a legitimate area of exploitation by the communications media. But we perceive a clear distinction between mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others, on the one hand and *real public or general concern* on the other.

What, then, are matters of real public or general concern? Most obvious, of course, are matters relating to governmental affairs, which necessarily involve public officers, public servants and employees and even candidates for public office. Both the public and private activities of these people, to the extent that they relate to performance of their duties or their qualifications or fitness for public service are clearly matters of public concern.

But public concern is not limited to matters governmental. As was said, again in Metromedia:[11]

> ". . . the constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. '[T]he Founders . . . felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government.' [Curtis Publishing Co. v. Butts, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)], Id., at 147, 87 S. Ct., at 1987, 18 L. Ed. 2d at 1107 (opinion of Harlan, J.). Comments in

[10]If *all* news were protected, there would, of course, be no need for a "public concern" category. It should be noted, however, that Justice Douglas disagrees and would extend the protection to include all news items. See his concurring opinion in Garrison v. Louisiana (1964), 379 U. S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125. This view was shared by the late Justice Black and is apparent in his concurring opinion in *Metromedia, id.,* at 57, 91 S. Ct. 1811, 29 L. Ed. 2d 296.

[11]Note 9, *supra,* at 42, 91 S. Ct. at 1819.

other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest. In Time, Inc. v. Hill, supra, we had 'no doubt that the . . . opening of a new play linked to an actual incident, is a matter of public interest,' 385 U. S. [374,] at 388, 87 S. Ct. [534] at 542, 17 L. Ed. 2d 456 at 467, which was entitled to constitutional protection. Butts held that an alleged 'fix' of a college football game was a public issue. Associated Press v. Walker, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), a companion case to Butts, established that the public had a similar interest in the events and personalities involved in federal efforts to enforce a court decree ordering the enrollment of a Negro student in the University of Mississippi. Thus, these cases underscore the vitality, as well as the scope, of the 'profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U. S. at 270-271, 84 S. Ct. at 721, 11 L. Ed. 2d at 701, 95 A. L. R. 2d 1412."

Thus, it appears, it can be broadly said that matters of real public or general concern are those which invoke common and predominant public activity, participation or indulgence, and cogitation, study and debate; and they include such matters as sporting events,[12] the performing and fine arts,[13] morality and religion,[14] the sciences,[15] and matters

[12] *See,* Time, Inc. v. Johnston (4th Cir. 1971), 448 F. 2d 378.

[13] *See,* Time, Inc. v. Hill (1967), 385 U. S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456; and Man v. Warner Bros., Inc. (S. D. N. Y. 1970), 317 F. Supp. 50.

[14] *See,* Gospel Spreading Church v. Johnson Pub. Co. (1971), 14 U. S. App. D. C. 207, 454 F. 2d 1050; and Spern v. Time, Inc. (W. D. Pa. 1971), 324 F. Supp. 1201.

[15] *See,* United Med. Laboratories, Inc. v. C. B. S. (9th Cir. 1968), 404 F. 2d 706.

relating generally to the health, well-being and general comfort of the public *as a whole.*[16] Accordingly, news items or featured articles or commentaries by communications media relating to these matters are and should be constitutionally protected notwithstanding that obscure *or* prominent individuals may be caught up in the current and regretfully defamed. That this is the law is again postulated in *Metromedia*:[17]

> "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication *involving matters of public or general concern,* without regard to whether the persons involved are famous or anonymous." (Italics added)

[16] *See, e. g.,* United Med. Laboratories, Inc. v. C. B. S., note 15, *supra* (health); Cullen v. Grove Press, Inc. (S. D. N. Y. 1967), 276 F. Supp. 727 (hospital for the criminally insane); Time, Inc. v. Ragano (5th Cir. 1970), 427 F. 2d 219 (organized crime); DeSalvo v. 20th Century Fox (D. Mass. 1969), 300 F. Supp. 742 (notorious individual crime); Dacey v. Florida Bar, Inc. (5th Cir. 1970), 427 F. 2d 1292 (probate matters); Cervantes v. Time, Inc. (8th Cir. 1972), 464 F. 2d 986 (corruption of government official); Novel v. Garrison (N. D. Ill. 1971), 338 F. Supp. 977 (assassination of a president); and Bon Air Hotel, Inc. v. Time, Inc. (5th Cir. 1970), 426 F. 2d 858 (decline of famous hotel).

[17] Note 9, *supra,* at 43, 91 S. Ct. at 1819.

A fortiori, if one *by his own volition* thrusts himself on the passing scene to the extent that he knowingly and consciously wants and needs publicity or public support for his endeavors or activities he *surely* submits himself to public scrutiny, which oftentimes may justly expose his private affairs as they might relate to the activities or endeavors for which he is seeking public approval.[18] Justice Terrell aptly noted this maxim in Kennett v. Barber:[19]

> ". . . one . . . who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that they may determine whether it squares with such a standard of integrity and correct morals as warrants their approval. Cason v. Baskin, Fla., 30 So. 2d 635."

III

But while we agree to all this, we are nevertheless strongly persuaded from our reading of the cases that a line must be drawn somewhere. For instance, Mr. Justice Brennan said in *Metromedia*:[20]

> "Further reflection over the years since New York Times was decided persuades us that the view of the 'public official' or 'public figure' as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either

[18] *See,* Ocala Star Banner Co. v. Damron (1971), 401 U. S. 295, 91 S. Ct. 628, 28 L. Ed. 2d 57. *See, also,* Gibson v. Maloney, note 8, *supra.*

[19] (Fla. 1947), 159 Fla. 81, 31 So. 2d 44, 46.

[20] Note 9, *supra,* at 47, 91 S. Ct. at 1822.

> to the values protected by the First Amendment or to the nature of our society. We have recognized that '[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.' Time, Inc. v. Hill, supra, 385 U. S. at 388, 87 S. Ct. at 542, 17 L. Ed. 2d at 467. Voluntarily or not, we are all 'public' men to some degree."

However, he went on:

> *"Conversely, some aspects of the lives of even the Most public men fall outside the area of matters of public or general concern.* See n. 12, supra; Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are *not* in the area of public or general concern." (Italics added)

And even though the court held in that case that the subject matter of the questioned publication therein was clearly a matter of public or general concern, the court in a footnote went out of its way to recognize the point we make here;[21]

[21] *See,* note 12 in *Metromedia,* note 9 *supra,* at 44, 91 S. Ct. at 1820.

> *"We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest.* We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities *not* within the area of public or general interest." (Italics added)

We hold up to the proposition, therefore, that regardless of the prominence of the person defamed there still may be a sector of his private life which is of no real concern to the public; and this private sector should be as zealously protected from defamation as is the right of the public to be concerned, and thus informed, about the public sector of his life.[22]

IV

So recognizing the pre-eminence of real public concern *vis a vis* the private affairs of the prominent or anonymous individual in terms of First Amendment sanctions, how, then, constitutionally to balance the rights of each to the extent it is legally possible to do so? The problem is a bifurcated one, obviously. We either must determine when or at what point the private activities of a public or prominent figure become the real concern of the public; or, alternatively, we must determine when conduct, or an event or series of events, or an historical occurrence or happening, or other noteworthy and recordable occasion, involves a *subject* of true public concern.

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[22] *See, also,* Belli v. Orlando Daily Newspapers, Inc. (5th Cir. 1967), 389 F. 2d 579, 587; and Buckley v. Esquire, Inc. (S. D. N. Y. 1972), 344 F. Supp. 1133.

In either case, we think that as a workable test the question is whether there is a *logical relationship* between the reported activities of the prominent person, or between the subject matter of the conduct, occasion or event reported or recorded, and the real concern of the public. This is clearly a matter of *law,* since reasonable men cannot differ on what is logical although logical men may differ on what is reasonable. Thus a publisher need not gamble on whether a given jury may reject as unreasonable his decision that a proposed publication involves a matter of public or general concern. He need only exercise *responsible judgment* in the premises, which is the least that's expected of him to begin with. He would exploit mere sensationalism at his own risk.

We cannot, of course, nor need we, attempt to hypothesize the manifold factual situations on either side of the question. Suffice it here to make note of the judiciousness suggested in *Metromedia:* ". . . the delineation of the reach" of the term "issue of public or general concern" ought be left to "future cases."[23] This is one of those future cases.

V

We now review the pertinent facts in this case in the light of the foregoing observations. As noted, petitioner and her ex-husband were well known. They were prominent among the "400" of Palm Beach society, and were also active members of the sporting set. Sadly, however, their marital difficulties were equally well known; and the charges and counter-charges of meretriciousness, flowing from both sides of the controversy, made their divorce action a vertiable *cause celebre* in social circles across the country. Additionally, as the District Court observed:[24]

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[23] *See,* note 9, *supra,* 91 S. Ct. 1811, 29 L. Ed. 2d 296.

[24] Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, 389.

> "The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
>
> The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . ."

Finally, on the point of notoriety, it appears that petitioner granted several interviews to news media during the divorce action and allowed herself to be quoted in relation thereto.

But withal, we are committed to the view that neither wealth, social position nor fame, of themselves, render the private affairs of those involved amenable to constitutionally protected unbridled public scrutiny under the guise of public or general interest. That the public was curious, titillated or intrigued with the scandal in the Firestone divorce is beyond doubt. But we again emphasize the distinction we make between that genre of public interest and real public or general *concern*. Applying the suggested test, where in this case is the logical relationship between the marital difficulties of the Firestones and real public concern? The matter certainly doesn't inhere significantly within the areas of public concern we categorized earlier;[25] and no category otherwise can be articulated except prurient curiosity, which we reject as too frivolous a predicate upon which to expend constitutional energies.

[25]While martial infidelity is still within the scope of "morality," notwithstanding this "enlightened age," that involved in a given marriage is not, significantly, a matter of any great public importance.

We would arrive at a different conclusion, no doubt, if (as in the celebrated case of a renowned conductor of the London Symphony who was sued for divorce some few weeks after publishing a book offering advice on martial bliss) one or the other of the parties herein were a profession marriage counselor. Obviously, in such case as an illustration, there would be a logical connection between the divorce action and the inquiring concern of the public whose patronage is sought. Likewise, as another and concrete, example, if the divorce were peripherally, or even prominently, alluded to in an exposé or feature article essentially exploring some other subject of legitimate public inquiry, such as the exposé of widespread wiretapping and "snooping" published in Life magazine which gave rise to another libel action between the parties hereto in the federal courts,[26] there would again be a valid basis for constitutional protection.[27] But we cannot find here any aspect of real public concern, and none has been shown to us, which would be furthered or enhanced by "free discussion" and "robust debate" about the divorce of Russell and Mary Alice Firestone.

Nor did petitioner's quoted interviews with the press raise the untidy affair to the dignity of true public concern. Unlike an actress who might grant interviews relating to

[26]See, Firestone v. Time, Inc. (5th Cir. 1972), 460 F. 2d 712.

[27]We do not mean to say, however, that a publisher can create his own "matter of public concern" and thereby defame others. We seriously doubt, for example, that Dr. Kinsey without obvious good purpose could have brought into constitutionally protected public focus the identity of those who formed a statistical basis for his "reports." On the other hand, a *bona fide* and responsible inquiry into the validity of the good doctor's reports (which we certainly don't impliedly impugn) could well in an extreme case subject persons involved in such reports to privileged public exposure. In either case, it is assumed, the resolved issue of "actual malice" would determine any question of "bootstrapping," i.e., creating a springboard from which to merely defame or sensationalize.

the opening of her new play, petitioner was not seeking public patronage. Publicity, or sympathy, perhaps, but not patronage. Irrespective of her subjective motives, objectively she was merely satiating the appetites of a curious press.

In sum, the Firestone divorce action was unquestionably newsworthy, but reports thereof were not constitutionally protected as being matters of real public or general concern.

VI

There may be other reasons, however, to reverse the judgment for petitioner herein. For example, although not *constitutionally* protected under the New York Times doctrine, the assailed publication herein may be "conditionally privileged" under Florida libel law. That is to say, being a report of a judicial proceeding (one such privileged publication) it may be so privileged within the contemplation of our previous holdings in Walsh v. Miami Herald Publishing Co.[28] and Shiell v. Metropolis Co.[29] This theory of defense was argued by respondent before the District Court along with five other points including the principal one upon which that court finally bottomed its decision. But the court disposed of all these matters by saying:[30]

> "Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error

[28](Fla. 1955), 80 So. 2d 669.
[29](Fla. 1931), 136 So. 537.
[30]Time, Inc. v. Firestone (Fla. App. 1971), 254 So. 2d 386, 387.

> we deem it judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine."

Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points raised.

Accordingly, certiorari is granted, the decision of the District Court is quashed, and the cause is remanded for further proceedings not inconsistent herewith.

ERVIN, CARLTON and DEKLE, JJ., concur.

ROBERTS, C. J., concurs specially with opinion.

ROBERTS, Chief Justice (concurring specially).

I concur in the opinion and judgment for the reasons stated and for the further reason that the libel was perpetrated by a weekly rather than a daily publication. In Ross v. Gore, 48 So. 2d 412 (Fla. 1950), and Jacova v. Southern Radio and Television Company, 83 So. 2d 34 (Fla. 1955), this Court commented that daily publications operate against stringent deadlines for the reason that the American public has come to demand "Today's news today". A reporter is expected to determine the facts in a matter of hours or minutes and it is only reasonable to expect that mistakes will be made.

In recognition of this fact, our state legislature has provided in Section 770.02, Florida Statutes, F. S. A., for correction, apology, or retraction by newspaper.

This statutory provision provides as follows:

> "If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

This retraction law excuses the newspaper from most of its liability if a simple correction and retraction of the inadvertent misstatement is made by publication in the same editions or corresponding issues of the newspaper.

However, a weekly publication does not have such stringent deadlines as the daily publications and can take the necessary time to fully explore the truth or falsity of a news item.

Section 4 of our Declaration of Rights (Article I, Constitution of Florida) guarantees that, "Every person may speak, write and publish his sentiments on all subjects *but shall be responsible for the abuse of that right.*" In overdramatizing the news item sub judice, the magazine simply closed its eyes to that portion of our constitution which says, "but shall be responsible for the abuse of that right".

The daily newspapers in Florida have not hesitated to retract and correct inadvertent misstatements in accordance with Section 770.02, Florida Statutes, F. S. A. Time, Inc., magazine was afforded the same opportunity, but refused to take advantage of this statutory provision.

Opinion and Order of the District Court of Appeal June 20, 1973, Directing Entry of Judgment for Petitioner

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TIME, INC., Appellant,

v.

MARY ALICE FIRESTONE, Appellee.

No. 70-802.

District Court of Appeal of Florida,

Fourth District.

June 20, 1973.

Rehearing Denied July 11, 1973

Harold R. Medina, Jr., of Cravath, Swaine & Moore, New York City, and William S. Frates and Larry S. Stewart, of Frates, Floyd, Pearson & Stewart, Miami, for appellant.

Robert M. Montgomery, Jr., of Howell, Kirby, Montgomery, D'Aiuto, Dean & Hallowes, West Palm Beach, for appellee.

WALDEN, Judge.

UPON SUPREME COURT MANDATE

This appeal is back before us per Mandate of the Florida Supreme Court based on its opinion and judgment reported as Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745. Faithful to its requirement, we vacate our opinion

reported as Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, insofar as it found merit in appellant's Point III:

> If there is a cause of action, whether plaintiff's proof was sufficient under the doctrine of New York Times v. Sullivan.

And now to the dilemma and our perplexity. What is our present duty and the requirement of law as concerns the treatment and disposition of appellant's remaining points? These points are:

POINT I

Whether there is a cause of action for libel without damage to reputation.

POINT II

Whether the publication fairly and accurately reported the final judgment.

POINT III

(Determined by the Supreme Court to be without merit in Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745.)

POINT IV

If there is a cause of action, whether plaintiff's proof was sufficient under the doctrine of common law qualified privilege for reports of judicial proceedings.

POINT V

Whether the defendant was denied a fair and impartial trial by plaintiff's counsel's appeals to passion and prejudice.

POINT VI

Whether plaintiff established any recoverable compensatory damages.

We chronicle:

When we undertook the determination of this appeal initially we considered each and every appellate point in depth and decided them in accordance with our understanding of law and the appellate function. We adjudged that Point V was without merit and apparently this decision has been accepted by the Supreme Court and the litigants. We decided that the remaining points had reversible merit, and reversed and remanded with instructions to enter a final judgment in favor of appellant, Time, Inc. It was our notion then and now that the litigants and the trial court (and the Supreme Court, upon the granting of certiorari) would surely know by reference to the points, which are of record, the reasons for our decision and the precise action to be taken by the trial court. This is to be distinguished from an instance where there is a naked reversal without directions or reference to any specific points on appeal, as Scott v. Rosenthal, Fla. App. 1960, 118 So. 2d 555; Fla. 1961, 131 So. 2d 480, and such instance as where there is not a majority opinion leaving the trial court without guidance on remand. Leveson v. State, Fla. App. 1962, 138 So. 2d 361; Fla., 147 So. 2d 524. Neither is this a case where jurisdiction is in issue and basis therefor unclear. Rosenthal v. Scott, supra; State v. Bruno, Fla. 1958, 104 So. 2d 588.

We assume that the litigants understood that we had fully adjudicated all points based upon the Supreme Court remark,[1]

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[1]Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745, ¶ VI, p. 753.

"Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court." And so it appears to us that *all points* and decisions as to them were presented to the Supreme Court for certiorari review.

By way of hindsight, we wish that we had more artfully expressed our decision inasmuch as it, in application, has apparently been misunderstood or overlooked upon further appellate review. We said the following[2]:

> "Time has presented six cogent points on appeal. We have examined all briefs, transcripts and exhibits, listened to oral argument, and researched each point on appeal with care. *We conclude that there is merit,* to various degrees, *to each point on appeal with the exception of number 5, passion and prejudice.* Since we find a multitude of reversible error we deem is judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine." (Emphasis supplied.)

Our decision to write an expanded opinion only upon Point III was based upon our interpretation of Canon 19 of the Canons of Judicial Ethics[3] and our concept of the

[2]Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, at p. 387.

[3]Canons of Judicial Ethics, 19 Judicial Opinions.

"* * *

"It is desirable that Courts of Appeal in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

"But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

"* * *."

tenets of judicial professionalism and tradition. We selected it simply because we thought it central and felt its determination would be of the largest service to the litigants, Bench and Bar. We deliberately did not discuss each of the points in detail because of the volume that would result and the basic fact that time and resource limitations preclude written opinions on each and every point presented in every brief. No court rule, statute, or court opinion requires such treatment to our knowledge. Of course, had we known at the time that our Point III opinion would not survive, we would have chosen another point to discuss in depth as a basis for reversal.

We deliberately did decide the merit of each point presented in an effort to be of assistance to the Supreme Court in case certiorari would be granted. We did this, too, in order to save the yo-yo or ping-pong effect of passing the appeal back and forth between the two courts with decisions being made a point at a time. Theoretically, there being six points, there could be twelve appellate presentations and twelve written opinions if this appeal were decided piecemeal, a point at a time, with the District Court being quashed in each instance. See Zirin v. Charles Pfizer & Co., Fla. 1961, 128 So. 2d 594, at 596, where it is said:

> "Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without 'sale, denial or delay.' *Piecemeal determination of a cause by our appellate court should be avoided and when a*

case is properly lodged here there is no reason why it should not then be terminated here. In the Lissenden case [P. C. Lissenden Co., Inc. v. Board of County Commissioners of Palm Beach County, Fla., 116 So. 2d 632] we said, with respect to appeals and in discussing an analogous matter '[m]oreover, the efficient and speedy administration of justice is * * * promoted' by doing so." (Emphasis supplied.)

The Supreme Court in the instant case said with reference to this problem[4]:

"There may be other reasons, however, to reverse the judgment for petitioner herein. For example, although not *constitutionally* protected under the New York Times doctrine, the assailed publication herein may be 'conditionally privileged' under Florida libel law. That is to say, being a report of a judicial proceeding (one such privileged publication) it may be so privileged within the contemplation of our previous holdings in Walsh v. Miami Herald Publishing Co. [(Fla. 1955), 80 So. 2d 669] and Shiell v. Metropolis Co. [(1931), 102 Fla. 794, 136 So. 537]. *This theory of defense was argued by respondent before the District Court along with five other points including the principal one upon which that court finally bottomed its decision.* But the court disposed of all these matters by saying: [Time, Inc. v. Firestone, Fla. App. 1971, 254 So. 2d 386, 387]

'Time has presented six cogent points on appeal. We have examined all briefs, transcripts

[4]Firestone v. Time, Inc., Fla. 1972, 271 So. 2d 745, at p. 752.

and exhibits, listened to oral argument, and researched each point on appeal with care. We conclude that there is merit, to various degrees, to each point on appeal with the exception of number 5, passion and prejudice. Since we find a multitude of reversible error we deem it judicious to only plumb one area, constitutional privilege, better known as the New York Times doctrine.'

"Respondent argues essentially the same points here, with the exception of the passion and prejudice point rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, *we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points raised.* (Emphasis supplied.)

"Accordingly, certiorari is granted, the decision of the District Court is quashed, and the cause is remanded for further proceedings not inconsistent herewith."

We gather that the gravamen of the above passage is that we are being directed "* * * initially to pass on the full merit of the remaining points raised." We, in all respect, interpret this to mean that our earlier decision on the points is being overlooked and we are directed to write an opinion on each of the four remaining points.

It is our respectful view, based on the foregoing, that there is a misunderstanding or lack of communication between our two courts.

We feel that the Supreme Court has been in nowise embarrassed or limited by our action and procedure. The Supreme Court, itself, has said that "* * * once we take jurisdiction of a case upon petition for a writ of certiorari we may take it for all purposes as though it had come originally on appeal to the Supreme Court." Mark v. Hahn, Fla. 1965, 177 So. 2d 5, at page 9, citing Tyus v. Apalachicola Northern R. R. Co. (Fla. 1961), 130 So. 2d 580; Zirin v. Charles Pfizer & Co. (Fla. 1961), 128 So. 2d 594; Adjmi v. State (Fla. 1963), 154 So. 2d 812; Hedges v. State (Fla.), 172 So. 2d 824; Florida Real Estate Commission v. Harris (Fla.), 134 So. 2d 785. See also Schoenrock v. Ballard, Fla. App. 1966, 185 So. 2d 760. Thus, it is clear that the Supreme Court had the power without hindrance to consider, review and decide all appellate points when it took jurisdiction and such action would avoid the needless additional steps condemned in Zirin v. Charles Pfizer & Co., supra.

We also note that the litigants are not entitled to a written opinion on each or any point as a matter of constitutional right. Taylor v. Knight, Fla. App. 1970, 234 So. 2d 156.

Without laboring the matter further, if it was the intendment of the Supreme Court to cause this court to reconsider its earlier decision and to write an opinion on each of the points supporting our decision, we must most respectfully decline upon the rationale and reasoning contained in Foley v. Weaver Drugs, Inc., Fla. App. 1965, 172 So. 2d 907; Young Spring & Wire Corp. v. Smith, Fla. App. 1965, 172 So. 2d 238; Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., Fla. App. 1965, 172 So. 2d 248; Home Development Co. of St. Petersburg v. Bursani, Fla. App. 1965, 176 So. 2d 100; and Hoisington v. Kulchin, Fla. App.

1965, 178 So. 2d 349. We specially agree with the rationale stated in Hoisington v. Kulchin, supra:

> "For the reasons set forth in the second opinion of this court in Foley v. Weaver Drugs, Inc., Fla. App. 1965, 172 So. 2d 907, we must respectfully decline, at this late date, to reconsider the cause and set forth the basis and reasoning for our decision. This is not to say that we do not recognize the paramount responsibility of the Supreme Court of Florida to supervise the judicial system of Florida. Our disinclination to comply with the request is based upon our concern for the proper function of this court in the judicial system of Florida; for to comply with the request would be to make an advocate of this Court if it should attempt to set forth the basis of its reasoning after its jurisdiction has expired.
>
> "Courts, be they trial or appellate, should at all times adhere to an atmosphere of cold neutrality and, at this stage of these proceedings, to write an opinion supporting a decision in favor of the appellees would in effect destroy the cold neutrality of impartiality and would relegate the court to an advocate who, by nature, must be partial."

Thus, in conclusion, we vacate our opinion reported at 254 So. 2d 386, in favor of the Supreme Court opinion reported at 271 So. 2d 745, insofar as it disposes of appellant's Point III.

Not newly, but by way of confirmation of our initial decision, reported at 254 So. 2d 386, we adjudicate that appellant's Points I, II, IV and VI have merit sufficient to

cause the reversal of the appealed judgment and entry of judgment for the defendant, Time, Inc.

In other words, we held as the basis and reason for our prior decision by reference and in the language of the points:

I. There is no cause of action for libel without damage to reputation.

II. The publication fairly and accurately reported the final judgment.

IV. Plaintiff's proofs were insufficient under the doctrine of common law privilege for reports of judicial proceedings.

V. Defendant was not denied a fair and impartial trial by plaintiff's counsel's appeal to passion and prejudice.

VI. Plaintiff did not establish any recoverable compensatory damages.

We do, therefore, adhere to our decision expressed in 254 So. 2d 386, to reverse the trial court and direct entry of judgment in favor of the defendant, Time, Inc., because of the reversible errors covered by Points I, II, IV, and VI.

It is so ordered.[5]

REED, C. J., and OWEN, J., concur.

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[5]We recognize, of course, that if the ligitants continue to be aggrieved and in case we have erred or misconstrued, the Supreme Court of Florida continues to have jurisdiction to correct and implement its mandate and, in the ultimate, to cause the disposition of this appeal in accordance with its views of the law. See generally 2 Fla. Jur., Appeals, §§ 387, 391.

Opinion and Order of the Supreme Court of Florida December 11, 1974, Directing Entry of Judgment for Respondent

IN THE

SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1974

MARY ALICE FIRESTONE,
Petitioner,
v.
TIME INC.,
Respondent.

Case No. 44,207
DCA Case No. 70-802

Opinion filed December 11, 1974

Writ of Certiorari to the District Court of Appeal, Fourth District

Robert M. Montgomery, Jr. and Edna L. Caruso of Howell, Kirby, Montgomery, D'Aiuto, Dean and Hall-lowes, for Petitioner

William S. Frates and Larry S. Stewart of Frates, Floyd, Pearson, Stewart, Proenza and Richman; and Harold R. Medina, Jr. of Cravath, Swaine and Moore, for Respondent

PER CURIAM.

This cause is before us on certiorari granted to review the decision of the District Court of Appeal, Fourth District, in *Time, Inc.* v. *Firestone,* opinion filed June 20, 1973, reported at 279 So. 2d 389 (Fla. App. 1973), which purportedly conflicts with *Coogler* v. *Rhodes,* 38 Fla. 240, 21 So. 109 (1897), *Montgomery* v. *Knox,* 3 So. 211 (Fla. 1887), *Myers* v. *Hodges,* 53 Fla. 197, 44 So. 357 (Fla.

1907), *Tip Top Grocery Co.* v. *Willner,* 186 So. 219 (Fla. 1938), *Miami Herald Pub. Co.* v. *Brown,* 66 So. 2d 679 (Fla. 1953), *McCormick* v. *Miami Herald Publish. Co.,* 139 So. 2d 197 (Fla. 1962), and *Hammond* v. *Times Publishing Co.,* 162 So. 2d 681 (Fla. App. 1964). We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, 1973.

Petitioner, herein, seeks review of the latest in a series of District Court opinions relative to her libel suit against respondent for publication of the following news item about petitioner:

> "Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune. Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on the grounds of extreme cruelty and *adultery;* after six years of marriage; one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl'." (emphasis supplied)

The decree of divorce was granted not on grounds of adultery but rather was granted on grounds of extreme cruelty. In the final judgment granting the divorce, the trial court found the equities to be with Mrs. Firestone and awarded her substantial alimony. Additionally, the trial court although stating that enough testimony had been introduced to make Dr. Freud's hair curl, specifically stated in the final judgment that the court was inclined to discount much of the testimony as unreliable.

After publication of the aforestated news item, petitioner demanded in writing a retraction of the article and alleged

that it was false, malicious and defamatory. The respondent declined to retract.

Complaint was thereafter filed by petitioner alleging that respondent had maliciously prepared, composed, published and distributed the above-described defamatory article. Summary judgment was entered by the trial court in favor of respondent. However, upon appeal of this summary judgment to the District Court of Appeal, Fourth District, that court, finding that there were genuine issues of material fact to be resolved by the trier of fact, including, inter alia, the question of malice, reversed and remanded the cause to the trial court. *Firestone* v. *Time, Inc.,* 231 So. 2d 862 (Fla. App. 1970), cert. denied 237 So. 2d 754. Upon remand, after trial by jury, verdict having been entered in favor of petitioner and against respondent, in the sum of $100,000, the trial court entered final judgment ordering that petitioner recover said sum from respondent.

Upon appeal, the District Court of Appeal, Fourth District, reversed the judgment primarily on the ground that the divorce was an event of great public interest within the rationale of *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), and that there was no malice on the part of Time, Inc. shown as required for recovery under the doctrine of *New York Times* v. *Sullivan,* supra.

This Court granted certiorari and reversed the above decision of the District Court on the basis that the publication did not come within the New York Times doctrine, specifically stating:

> "In sum, the Firestone divorce action was unquestionably newsworthy, but reports thereof were not constitutionally protected as being matters of real public or general concern." *Firestone* v. *Time, Inc.,* 271 So. 2d 745 (Fla. 1972).

However, this Court did not decide the remaining points raised by respondent, but rather remanded to the District Court, stating:

> "Respondent argues essentially the same points here, with the exception of the passion and prejudice point, rejected by the District Court. However, we do not decide these points, other than the constitutional one, nor do we concede merit therein. Rather, we deem it more propitious and proper to remand the cause to the District Court which has the entire record before it and is better situated initially to pass on the full merit of the remaining points."

Upon remand to reconsider the remaining points raised on appeal, in a decision entitled "Upon Supreme Court Mandate," *Time, Inc.* v. *Firestone*, 279 So. 2d 389 (Fla. App. 1973), the District Court stated that it assumed that all litigants understood that all points raised on appeal had been adjudicated in its prior decision. Noting that the litigants are not entitled to a written opinion on each and every point, the District Court, by way of confirmation of its initial decision reported at 254 So. 2d 386, adjudicated without explanation that Time, Inc.'s Points I, II, IV and VI, as specifically delineated in its decision, have merit sufficient to cause reversal of the appealed judgment and entry of judgment for Time, Inc.

We cannot agree with the decision of the District Court which reverses the judgment of the trial court. As previously stated herein, the truth is that the divorce was *not* granted on grounds of adultery and there was no express finding in the final judgment of divorce that either of the parties was guilty of marital infidelity. This Court in *Firestone* v. *Time, Inc.*, 271 So. 2d 745 (Fla. 1972), in a pertinent footnote expressly stated:

> "In reviewing the divorce proceeding on certiorari, this court expressly determined that the trial judge 'did not find the wife guilty of adultery.' Rather, it was pointed out that the divorce was granted for lack of 'domestication,' in the language of the trial judge, which of course was not one of the statutory grounds at the time of divorce. We affirmed the decree, nonetheless, but on the ground of 'extreme cruelty,' the record having fully supported such conclusion and thus necessitating an affirmance. Firestone v. Firestone (Fla. 1972), 263 So. 2d 223."

The appropriate statutory procedure was followed by petitioner in requesting retraction of the defamatory publication which is the subject of this suit, Sections 770.01 and 770.02, Florida Statutes, *Ross* v. *Gore*, 48 So. 2d 412 (Fla. 1950), but respondent elected not to retract and must stand upon the accuracy of its statements. *Walsh* v. *Miami Herald Publishing Co.*, 80 So. 2d 669 (Fla. 1955). The statement that the divorce was granted on grounds of adultery is totally inaccurate.

The false accusation of a woman of adultery is libelous per se. *Layne* v. *Tribune Co.*, 146 So. 234 (Fla. 1933), *Harriss* v. *Metropolis Co.*, 160 So. 205 (Fla. 1935), *Sharp* v. *Bussey*, 187 So. 779 (Fla. 1939), 20 Fla. Jur. Libel and Slander, Section 20, 50 Am. Jur. 2d Libel and Slander, Section 60, Restatement of the Law of Torts, Chapter 24, Section 569 f.[1] Words which amount to libel per se import

[1]Not only does the statement that a woman has committed adultery impute unchastity but furthermore it imputes to another conduct constituting a criminal offense. Section 798.01, Florida Statutes,

damages and malice and are actionable in and of themselves without allegation or proof of special damages. *Briggs* v. *Brown,* 55 Fla. 417, 46 So. 325 (Fla. 1908), *Johnson* v. *Finance Acceptance Co. of Georgia,* 159 So. 364 (Fla. 1935), *Cooper* v. *Miami Herald Pub. Co.,* 31 So. 2d 382 (Fla. 1957), *Campbell* v. *Jacksonville Kennel Club,* 66 So. 2d 495 (Fla. 1953). Relative to the presumption of recoverable compensatory damages, this Court stated in *Commander* v. *Pedersen,* 156 So. 337 (Fla. 1934):

> "The law applicable to the case under consideration appears to be stated in 17 R. C. L. 263 et seq., as follows:
>
> ". . .
>
> ". . . In the case of words actionable per se their injurious character is a fact of common notoriety, established by the general consent of men, and the court consequently takes judical [sic] notice of it. They necessarily import damage, and therefore in such cases general damages need not be pleaded or proved . . ., and special damage need not be shown to sustain the action. Moreover, malice is presumed as a matter of law in such cases. . . ."

The Supreme Court of the United States in *Gertz* v. *Welch, Inc.,* opinion decided June 25, 1974, has recently stated that,

> "It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther

provides: "Living in open adultery.—Whoever lives in an open state of adultery shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. Where either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense provided for in this section."

> than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

Sub judice, the trial judge properly instructed the jury that if libel is proven by the greater weight of the evidence *which caused actual damages* to the plaintiff, they should award plaintiff an amount of money that will fairly and adequately compensate her for such damages, and instructed that "It is *only damages which are a direct and natural result of the alleged libel* which may be recovered. If you find the plaintiff is entitled to recover damages, you may consider any shame, mortification, mental anguish, or hurt feelings experienced in the past or to be experienced in the future, if any, which you find from the evidence. There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in light of the evidence." (emphasis supplied). The jury heard the testimony and considered the evidence before

it, and the factors enumerated in the instruction of the trial judge which are the same as those set out by the Supreme Court of the United States in *Gertz,* supra, and upon the evidence decided that a just and fair award for the damages suffered by petitioner would be $100,000. This award is supported by competent evidence concerning the injury. As aforestated, the Supreme Court of the United States in *Gertz,* supra, recognized that there need be no evidence which assigns an actual dollar value to the injury.

We must also emphasize that the trial court specifically instructed the jury that,

> "I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of *Firestone* v. *Firestone,* Case No. 64 C 2790C. *McCormick* v. *Miami Herald Publishing Co.,* 139 So. 2d 197 (2nd DCA 1962)."

Therefore, to reach a verdict for petitioner, the jury must necessarily have determined that the article did have a different effect than the reading of the divorce judgment by the public. In *McCormick* v. *Miami Herald Publishing Company,* 139 So. 2d 197 (Fla. App. 2, 1962), the court stated that a workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. See also, *Hammond* v. *The Times Publishing Co.,* 162 2d 681 (Fla. App. 2, 1964). Evidently, the jury determined sub judice that the article in question would have a different effect.

In *Firestone* v. *Time, Inc.,* 271 So. 2d 745 (Fla. 1972), relative to the statement herein involved, this Court explained:

> "If not constitutionally protected, and again assuming a defamatory falsehood, then the publication herein renders respondent amenable under the Florida common law on the subject, to-wit: that a published defamatory falsehood which is libelous *per se,* unless otherwise privileged, is actionable absolutely and no malice need be shown—truth being the only defense."

Publications of judicial proceedings under the laws of Florida are only qualifiedly privileged *if* they are fair and impartial *and also* accurate in regard to all material matters. *Shiell* v. *Metropolis Co.,* 136 So. 537 (Fla. 1931), *Walsh* v. *Miami Herald Publishing Co.,* supra. If a statement is qualifiedly privileged and is made without malice, then no cause of action accrues. *Teare* v. *Local Union No. 295 of United Assn. of Journeymen and Apprentices of Plumbers & Pipefitters, etc.,* 98 So. 2d 79 (Fla. 1957).

Sub judice, the trial judge properly submitted the question of fairness and accuracy of the publication on material matters and the question of malice or reckless disregard on the part of respondent in publishing said article to the jury. Quoting with approval from *Age-Herald Publishing Co.* v. *Waterman,* 102 Ala. 665, 81 So. 621, this Court declared in *Shiell* v. *Metropolis Co.,* supra, as follows:

> "A fair and accurate report may be made of a judicial proceeding either by reporting it literally and completely, or by giving a more or less condensed summary. And in case of a partial or con-

> densed report its fairness and accuracy with respect to the particular question in hand must in general be determined by the jury. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 449, 61 So. 345. In the instant case it was clearly a jury question."

See also: *Metropolis Co.* v. *Croasdell,* 199 So. 568 (Fla. 1941), *Meyers* v. *Hodges,* 53 Fla. 197, 44 So. 357 (Fla. 1907), *Coogler* v. *Rhodes,* 38 Fla. 240, 21 So. 109 (1897), *Diplomat Elec. Inc.* v. *Westinghouse Elec. Supply Co.,* 430 F. 2d 38 (5th Cir. 1970), *Morgan* v. *Dun & Bradstreet, Inc.,* 421 F. 2d 1241 (5th Cir. 1970).

Careful examination and consideration of the record discloses that the judgment of the trial court is correct and should have been affirmed on appeal to the District Court.

Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz* v. *Welch, Inc.,* supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of "journalistic negligence."

Accordingly, the decision of the District Court is quashed and the cause is remanded with directions to reinstate the jury verdict and final jugdment thereon in favor of petitioner.

It is so ordered.

ADKINS, C.J., ROBERTS, BOYD and DEKLE, JJ., Concur

OVERTON, J. Dissents with opinion

ERVIN J., Dissents

OVERTON, J., dissenting.

I dissent. In my opinion, there is no conflict jurisdiction. The District Court, in reversing the trial court, properly applied McCormick v. Miami Herald Publishing Company, 139 So. 2d 197 (Fla. 1962), and Hammond v. Times Publishing Company, 162 So. 2d 681 (Fla. App. 1964).

Supreme Court, U. S.
FILED
MAR 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. A-641-(74-944)

TIME, INC.,

Petitioner,

versus

MARY ALICE FIRESTONE,

Respondent.

RESPONDENTS' JURISDICTIONAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TIME, INC.,

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Respondent.

OPINIONS AND ORDERS BELOW

This case has had numerous appeals. On November 15, 1968, the trial court rendered a summary judgment in Time, Inc.'s favor (Petitioner's Appendix D). That order was appealed and reversed (Petitioner's Appendix E). The cause then went back to trial and a jury verdict was entered on September 9, 1970, in favor of Mrs. Firestone and against Time, Inc. in the amount of $100,000 (Petitioner's Appendix F). Time, Inc. then appealed to the Fourth District Court of Appeal raising six points on appeal, one of which was whether Time, Inc. was liable under *New York Times v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct.710, since Mrs. Firestone's divorce was, so argued Time, Inc., a matter of public interest. The Fourth District stated that it found merit to each point, to various degrees, but only discussed reversal under the New York Times doctrine. The Court held that under that doctrine

the divorce of Mrs. Firestone was an event of public interest as a matter of law, and that as a matter of law and fact Time, Inc. was not guilty of malice or reckless disregard in publishing the article labeling Mrs. Firestone an adulteress. The Court then reversed the verdict and judgment in favor of Mrs. Firestone and entered judgment in favor of Time, Inc. (Petitioner's Appendix G). Mrs. Firestone then petitioned the Florida Supreme Court for certiorari and that court quashed the Fourth District's decision holding that the Firestone divorce was not a matter of great public interest and therefore the New York Times doctrine did not protect Time, Inc. The Florida Supreme Court remanded the cause back to the fourth District for consideration of the other five points that had been originally raised by Time, Inc. in that court (Petitioner's Appendix A).

It should be noted that if Time, Inc. wanted review of that decision, which made the ruling on the New York Times doctrine, it would have had to appeal it at that time. It makes no difference that the Florida Supreme Court, after quashal of the Fourth District's decision, remanded the cause for consideration of the "other issues presented". The issue presented as to the New York Times doctrine was very clearly finally decided by that decision, and Time, Inc. chose not to appeal it. Time, Inc. clearly can not now contend that that opinion, which was rendered over two years ago, on December 20, 1972, can now be reviewed by this Court. Time, Inc. made a decision at that time not to appeal the opinion and must now live with that decision.

After the Florida Supreme Court remanded the case to the Fourth District Court of Appeal for consideration of of the other issues that had been raised by Time, Inc.,

the Fourth District merely rendered a decision finding "reversible error as to all of the other points presented" (Petitioner's Appendix B). Mrs. Firestone again petitioned the Florida Supreme Court, which again issued an opinion on December 11, 1974, quashing the Fourth District's decision and ordering reinstatement of the jury verdict and final judgment in favor of Mrs. Firestone (Petitioner's Appendix C). That is the only decision that is rightly before this court for consideration as to jurisdiction.

JURISDICTION

This court lacks jurisdiction under 28 USC §1257 to review the Florida Supreme Court's decision rendered in 1972, since that decision finally settled and disposed of the issue as to whether Mrs. Firestone's marriage was a matter of great public interest and should have been appealed at that time. That adjudication was not subject to further review by a state court. Once the mandate was issued after the first appeal to the Florida Supreme Court, on the subsequent appeal nothing was brought up but the proceeding subsequent to the mandate. *Illinois v. Illinois Central R Co.* (1902) 22 S.Ct. 300, 184 U.S. 77.

In *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.* (1973) 94 S.Ct. 407, 414 U.S. 156 this Court reviewed a judgment of the North Dakota Supreme Court, under which the case had been remanded so that further state proceedings could be conducted respecting Snyder's application for a permit to operate a drug store. This court held that judgment to be a final judgment and ripe for review.

In *Miami Herald Publishing Co. v. Tornillo* (1974) 94 S.Ct. 2831, it was held that the Florida Supreme Court's

judgment upholding the constitutionality of a certain statute and remanding the matter for further proceedings was final and ripe for review by this Court.

Reece v. State of Georgia (1955) 76 S.Ct. 167, cited by Time Inc., is clearly distinguishable. There the defendant was convicted and sentenced. He appealed and one of his points on appeal was systematic exclusion of Negroes from the jury. The Georgia Supreme Court found against Reece on that point, but reversed the case on another ground and remanded it for a new trial. The defendant was retired and again found guilty. He then appealed through the state courts and his conviction was upheld. On appeal to this Court, it was held that Reece could raise the question in regard to systematic exclusion of Negroes.

It is evident that the *Reece* holding is correct because Reece appealed to this Court the question as to systematic exclusion of Negroes at the first opportunity he had to do so. Even though the Georgia Supreme Court had ruled against him on that point in the first appeal, it had nonetheless reversed for a new trial. Hence, clearly Reece would not have been expected to appeal to this Court at that time. Unlike in the Reece case, in the present case, Time, Inc. did not appeal to this Court, at the first opportunity for doing so, the issue as to whether Mrs. Firestone's divorce was a matter of public interest. Rather, since Time, Inc. *lost* the first appeal, rather than won as Reece did, Time, Inc. had the opportunity to appeal the decision to this Court at that time, and decided not to do so. Hence, that decision can not be reviewed at this time.

QUESTIONS PRESENTED

1. Was the Supreme Court of Florida in error under the First Amendment because it imposed liability without fault wtih respect to a routine news item reporting a judicial decision accurately, carefully and competently?

2. Was petitioner's news item a rational interpretation of an ambiguous judicial opinion and thus entitled to First Amendment protection so that failure of the Supreme Court of Florida to affirm dismissal of the action was error?

3. Was the Supreme Court of Florida in error because of its failure (a) to impose an "actual malice" standard of proof under the First Amendment upon a plaintiff who had instituted and been drawn into a particular public controversy which commanded a substantial amount of independent public interest and who brought suit with respect to a routine news item reporting accurately, carefully and competently a judicial decision that was given nationwide coverage because of the prominence of the parties involved in that particular public controversy, and (b) under that standard to affirm dismissal of the action?

4. Did respondent's explicit withdrawal of any claim for damage to reputation arising from a routine news item reporting a judicial decision make mandatory imposition of an "actual malice" standard of proof under the First Amendment so that the failure of the Supreme Court of Florida to impose that standard and affirm dismissal of the action was error?

STATEMENT OF THE CASE AND FACTS

On December 15, 1967, Russell A. Firestone, Jr., was granted a divorce from Mary Alice Firestone. Mrs. Firestone had originally sought separate maintenance, but her husband counterclaimed "for divorce on grounds of ex-

treme cruelty and adultery." In awarding the divorce to Russell Firestone, the divorce decree stated:

> ". . . It is the conclusion and the finding of the Court that neither party is domesticated. . . In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved. . . ."

The divorce decree also awarded alimony in the sum of $3,000.00 per month to Mrs. Firestone, plus custody of their minor child, and $740.00 per month child support (Pltf's Exhibit 2).

Defendant Time, Inc., the publisher of the magazine "Time," printed on December 22, 1967, under the heading "Milestones", the following article:

> "Divorced. By Russell A. Firestone, Jr., 41 heir to the tire fortune; Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach school teacher; *on grounds of extreme cruelty and adultery;* after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, to 'make Dr. Freud's hair curl'." (emphasis added) (Pltf's Exhibit page 77).

Thereafter on January 19, 1968, Mrs. Firestone, through her attorney, demanded in writing a retraction of said article (T92-94; Pltf's exhibit A & B). Since Mrs. Firestone had been awarded alimony, she had not been found guilty of, nor had the divorce been granted on, the ground of adultery (as stated in Time's article), for under the laws of Florida a wife found guilty of adultry could not

be awarded alimony. §61.08 F.S. Notwithstanding, Time, Inc. declined to retract the article.

Mrs. Firestone then filed a libel suit against Time, Inc., which defended asserting, among other things, the absence of actual malice. This cause came on for trial on July 13, 1970. The jury returned a verdict for Mrs. Firestone and against Time, Inc. in the amount of $100,000.00, and a Final Judgment was entered pursuant to the jury verdict on September 9, 1970 (R462). The various appeals discussed, *supra*, followed.

The facts in this case clearly support the jury verdict. Bill Doerner, who had been with Time Magazine approximately six months at the time this article was written, came into the office of Miss Ursula Nadasdy, a legal researcher for Time magazine, and showed to her an Associated Press wire pertaining to the Firestone divorce. The AP dispatch merely stated that Mrs. Firestone was "accused of" adultry (T345,207; Def's Exhibit 1). Miss Nadasdy immediately called the "library" to obtain all folders pertaining to the Firestones (T208-9). She promptly sent a query to Time, Inc's. Miami bureau (T209-10; Pltf's Exhibit 6) specifically asking them to report "the grounds on which it (the divorce) was granted *in the words of the Judge*" (T185-6,202). She explained that the legal grounds for the divorce were necessary and that Time, Inc. would not just take the word of the Associated Press or any other source. It was up to their correspondents to get the exact grounds (T201-2).

Miss Nadasdy did, in fact, receive precisely what she requested (Plf's Exhibit 4). In quotation marks, the correspondents for Time, Inc., told the New York office the grounds for the divorce *in the words of the Judge:*

> "The judge, however, in quite a colorful opinion, said that 'neither of them had shown the least susceptibility to domestication and that the marriage should be dissolved'." (T189).

The communications between Time's New York office and their Miami branch were rather fast and furious. Because this was a Saturday and the deadline for the publication of this magazine usually was 8:00 p.m., everyone was working against this deadline (T191).

In addition to the AP dispatch and the dispatch from Time, Inc's Miami Buerau, neither of which stated Mrs. Firestone had been found guilty of adultery, Miss Nadasdy obtained a clipping of a New York newspaper which likewise stated that Mrs. Firestone had been "accused" of adultery.

One of Time Inc's. "stringers", Bob Delaney, was asked to check out the divorce. Neither Delaney nor any other Time employee ever once looked at the court file or read the divorce decree (T262). However, based upon a telephone conversation with Mrs. Firestone's attorney in the divorce proceedings, Mr. Farish, Jr., Mr. Delaney advised Time, Inc. that the grounds for the marriage were extreme cruelty and adultery. Mr. Farish, Jr., completely denied that he had ever told Mr. Delaney that (R76-77). Farish, Jr., testified that Delaney had asked him what Mrs. Firestone was accused of, and Farish Jr., had stated that Mr. Firestone had accused her of extreme cruelty and adultery. However, he had pointed out to Delaney that the Court had granted the divorce on the ground of lack of domesticity. He advised Delaney that Mrs. Firestone had not been found guilty of adultery (T86-90).

Delaney had also contacted Judge Knott, the trial judge

who rendered the divorce decree. Judge Knott emphatically testified that he never told Delaney that Mrs. Firestone was found guilty of adultery (T447-8). On proffer, he also testified under oath that he did not in fact find Mrs. Firestone guilty of adultery in his order (T438).

Once all this information was obtained by Nadasdy, it was turned over Doerner, the writer. He wrote the first draft of the article, later to be submitted to Mr. George G. Daniels, the Senior Editor, for final approval (Pltf's Exhibit 9). Doerner admitted that both sources he used to write the first draft of the article mentioned that the presiding Judge doubted the testimony of extramarital affairs (T353). Doerner had included a statement to that effect in his draft of the article, because he felt that it was important and certainly should be included in the article (T353,355). However, in the final draft, the Senior Editor Daniels performed surgery on Doerner's work deleting that doubt (T354) by omitting that statement, and all other references to "accused", "counterclaimed", or "alleged". At trial Doerner admitted that there was nothing that he had before him, that stated that the lower court had ruled that Mrs. Firestone was guilty of adultery (T364). Notwithstanding, the final draft of the article (Pltf's Exhibit 10) stated that the divorce was granted on the grounds of extreme cruelty and adultery (T370), failed to mention a word about the Judge discounting much of the testimony as to extramarital activities and failed to mention anything about lack of domesticity, the ground given in the divorce decree as the ground for the divorce.

Finally, it was the duty of Miss Nadasdy to perform an accuracy check and to place over each word a line showing that it had, in fact, been checked and that it was accurate (T178). She failed to check and mark the word "adultery",

although the other words were so marked showing that they had been checked out and that they were accurate. Mr. Daniels, the Senior Editor, admitted that Time required each word to be so marked and that Ursula Nadasdy, the researcher, had failed to meet that requirement (T322). He also admitted that although he had "thought" someone had checked the circuit court file and read the divorce decree prior to publication (T262), no one had done so.

REASONS FOR DENYING THE WRIT

Time, Inc. initially argues that the Florida Supreme Court dislikes and distrusts the press. Certainly that is a gross and flagrant accusation, supported by nothing perhaps but a personal dislike or distrust of the Florida Supreme Court.

Time, Inc. then essentially sets forth five arguments why the writ should be granted.

1. As discussed *supra*, the Florida Supreme Court's decision that Mrs. Firestone's divorce was not a matter of public interest was rendered back in 1972. Time, Inc. did not appeal that decision at that time, and hence cannot now raise that issue in the appeal from a subsequent decision of the Florida Supreme Court rendered in a later appeal and which did not address itself to that issue.

There is an additional reason why Time, Inc.'s, argument must be rejected. Time, Inc. here argues that Mrs. Firestone was a public figure and that under *Butts* and other cases she had to show "actual malice" to recover for defamation. Time, Inc. then states that the Florida Supreme Court failed to address itself to whether Mrs.

Firestone was a *public figure* or not, but simply found that her divorce was not a matter of public interest or concern. However, Time, Inc. overlooks the fact that it never argued in the many briefs filed in the Florida appellate courts that Mrs. Firestone was a *public figure*. Although Time, Inc.'s point on appeal was expressed in terms of whether Mrs. Firestone's proof was sufficient under the New York Times doctrine, the only argument ever advanced in support thereof was that Mrs. Firestone's divorce was a matter of public interest.

Time, Inc. stated in its initial brief to the Fourth District Court of Appeal:

> "The New York Times decision involved, of course, only a "public official". However, both the Florida and Federal courts have now made it quite clear that the standards of that decision apply to any publication involving a matter of *public interest.*" (emphasis added)

Throughout that brief and all the following briefs filed by Time, Inc. and Mrs. Firestone, the argument was whether Mrs. Firestone's divorce was a matter of *public interest.* (Respondent's Appendix A and B). It was not ever, not once, contended by Time, Inc. that Mrs. Firestone was a public figure. Now Time, Inc. has evidently decided that the Florida Supreme Court correctly decided that her divorce was not a matter of great public interest, and now wishes to argue, for the first time, that she was a public figure instead. Certainly Time, Inc. cannot now raise this argument when it has never once done so throughout the appellate process in the Florida Courts. *F.T.C. v. Travelers Health Assn.* (U.S. 1960) 80 S.Ct.717, 362 US 293, *U.S. v. Spector* (Cal.1952) 72 S.Ct.59, 343 U.S.169.

Even if the point were arguable, Time, Inc. merely cites language from the Florida Supreme Court's opinion as support for the finding that Mrs. Firestone was a public figure. However, regardless of what the Florida Supreme Court said, that finding must be record supported. As stated by this Court in *Gertz v. Welch*, Case No. 72-617, June 25, 1974.

> "None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was a typical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent *clear evidence* of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (emphasis added)

The *clear evidence* required for proof that Mrs. Firestone was a public figure is completely lacking.

2. The Florida Supreme Court's decision is not incompatible with *Time, Inc. v. Pape* (1971) 91 S.Ct. 633,401 U.S.282. It should first be noted that that case is applicable only if it is found that the New York Times doctrine is applicable, only if it can be found that Mrs. Firestone was a public figure as argued by Time, Inc. However, as shown under subsection 1, *supra*, Time, Inc. cannot now raise the issue of whether Mrs. Firestone is a "public figure" for a variety of reasons. It therefore follows that *Pape* is completely inapplicable.

Moreover, the Pape decision is inapplicable because in the present case Time, Inc. did not secure a copy of the divorce decree, read it and then, based upon its interpretation of the divorce decree, report in the article that Mrs. Firestone was divorced for adultery. If Time, Inc. did not read and rely upon an interpretation of language in the divorce decree, which it now contends is ambiguous, how can this case fall under the Pape decision. *Pape* concerns rational interpretations of an ambiguous document. Here, Time, Inc. did not *read* or *rely* upon the divorce decree for its article. Hence, it cannot now be heard to argue backwards and rely upon any ambiguity it might "after the fact" find to exist in the divorce decree.

Furthermore, the Florida Supreme Court's decision is not incompatible with *Pape*, even if it were applicable. *Pape* concerned publication of an article by Time, Inc. summarizing a government report, issued by the United States Commission on Civil Rights, entitled "Justice" and relating to police brutality. "Justice" had referred to the case of *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473 solely by quoting the allegations set forth in Monroe's complaint against the Deputy Chief of Detectives, Pape. However, the Time article gave the following account of the Monroe incident:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says Justice, 'broke through two doors woke the Monroe couple with flash lights * * *.'"

The article went on to quote at length from the sum-

mary of the Monroe complaint, without indicating in any way that the charges were those made by the complaint rather than independent findings of the Commission which wrote the government report. Pape sued Time, Inc. based upon the above article. This Court held that Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of the Commission's report which bristled with ambiguities. Thus, as a matter of law it was found that there was no "actual malice" on Time's part.

The present case is clearly distinguishable from *Pape*. This court clearly pointed out in that case that *Pape* differed "in a number of respects from the conventional libel case". There, the publication sued on was not Time's independent report of the Monroe episode, but its report of what the Civil Rights Commission had said about the episode. Since the Commission's report was ambiguous and the conclusion drawn by Time was a rational interpretation of it, there was no malice. Unlike in that case, in the present case, we *are* concerned with Time's independent report of the divorce rather than a summary of what Judge Knott said in the divorce decree, or a summary of the terms of the divorce decree. If Time's article had purported to be either, then perhaps there might be room for error in interpretation. However, the article in question was Time, Inc.'s own independent report, based upon Time, Inc.'s own independent research and investigation, since it did not purport to be a summary of what Judge Knott said or did in the decree, but rather stated as *fact* that Russell Firestone had been granted a divorce from Mrs. Firestone on the grounds of adultery.

In order to rely upon *Pape*, Time, Inc. must have read and relied upon the divorce decree, which it now con-

tends is ambiguous. They did neither and therefore they can not possibly claim their article was the result of a rational interpretation of the divorce decree, which is what *Pape* is all about.

3. There was clearly no imposition of liability without fault by the Florida Supreme Court. Nor did the Florida Supreme Court find negligence based solely upon the basis that the article about Mrs. Firestone was in error, as Time, Inc. contends. Such gross generalizations completely ignore the evidence.

Time, Inc. argues that proper editorial procedure was used and that there was no evidence whatsoever of actual malice or negligence. However, none of the sources of information which came to Time, Inc. indicated Mrs. Firestone was found guilty of adultery, except the statement from their stringer Delaney. Did this raise serious doubt in Time, Inc.'s eyes as to its truth or falsity? Evidently so. After the article was written, Miss Nadasdy was to perform an accuracy check and place over each word a line showing that it had in fact been sufficiently checked (T178). Her failure to check and mark the word "adultery" is clearly evidence that there was serious doubt, at least in her mind, as to its accuracy or its truth or falsity. This certainly indicates serious doubt as to whether they had checked the statement out sufficiently to go ahead and publish it as being an accurate statement. That doubt, in and of itself, clearly indicates that Time, Inc., while doubting whether a statement that Mrs. Firestone was found guilty of "adultery" was accurate, was guilty of negligence and reckless disregard in going ahead and publishing nationwide an article labeling Mrs. Firestone an adulteress, just because it was expedient to do so in order to meet the deadline they were working against.

Time, Inc. argues that the documents relied upon by it gave the same picture that their article gave (ie.), that the divorce was granted for extreme cruelty and adultery. However, in those documents "accused of adultery" was the exact terminology used.

Time, Inc. also argues that if it had published the full text of the divorce decree, it would still be liable under the rationale of the Florida Supreme Court because the decree would have conveyed to the public exactly what their "Milestones" article did—that Mrs. Firestone had been divorced on grounds of extreme cruelty and adultery. This clearly overlooks the fact that the jury found exactly to the contrary, finding that the "Milestones" article had a different effect on the mind of the reader than the divorce decree. As stated by the Florida Supreme Court in its second opinion (Appendix C):

"We must also emphasize that the trial court specifically instructed the jury that,

> 'I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of Firestone v. Firestone, Case No. 64 C 2790C. McCormick v. Miami Herald Publishing Co., 139 So.2d 197 (2nd DCA 1962).'

Therefore, to reach a verdict for petitioner, the jury must necessarily have determined that the article did have a different effect than the reading of the divorce judgment by the public. In McCormick v. Miami Herald Publishing Company, 139 So.2d 197 (Fla.App.2,1962), the court stated that a workable test is whether the libel as published would have a different effect on the mind

> of the reader from that which the pleaded truth would have produced. See also, Hammond v. The Times Publishing Co., 162 So.2d 681 (Fla.App.2, 1964). Evidently, the jury determined sub judice that the article in question would have a different effect."

Time, Inc. then argues that just because it refused to retract, this fact cannot be taken as negligence or actual malice. We agree. However, Time, Inc. argues, how could it retract that which was true. And we ask, how can Time, Inc. once again call Mrs. Firestone an adulteress at this point in time when they know: (1) that the Judge said he did not find Mrs. Firestone guilty of adultery; and (2) the Florida Supreme Court has found that the divorce was not granted on grounds of adultery.

Time, Inc. states that the trial judge did what he was not supposed to do(ie.), found Mrs. Firestone guilty of adultery and also awarded her alimony. This is ridiculous. Nowhere in the divorce decree does the judge find Mrs. Firestone guilty of adultery; the judge so testified and the Florida Supreme Court later so found. *Firestone v. Firestone* (1972) 263 So.2d 223. Even in the decision here appealed the Florida Supreme Court clearly stated:

> ". . . the truth is that the divorce was not granted on grounds of adultery and there was no express finding in the final judgment of divorce that either of the parties was guilty of marital infidelity."

Moreover, as shown under subsection (1) *supra*, Time, Inc. did not read or rely upon the wording in the divorce decree for publication of its article.

4. Time, Inc.'s argument and interpretation as to what the Florida Supreme Court's decision imposes on a pub-

lisher is distorted. The Florida Supreme Court absolutely did not hold that a publisher has to satisfy all the requirements that Time, Inc. sets forth at page 17 of its brief. Rather, the Florida Supreme Court held that *under the facts and circumstances of this case*, looking at the totality of the situation, there was sufficient evidence of negligence on Time, Inc.'s part. Time, Inc. overlooks and ignores all of its acts pointing to negligence and merely argues that the divorce decree, which it never once read, was ambiguous.

Time, Inc. lastly argues that the New York Times doctrine applies to reports of judicial proceedings as well as to public officials, public figures and matters of public or general concern. That is clearly not so, as indicated by *Gertz v. Welch*, U.S. Sup.Ct., Case No. 72-617, June 25, 1974.

5. Time, Inc. contends that even applying *Gertz, supra*, to the present case, actual malice had to be proved since Mrs. Firestone did not claim, as an element of damages, damage to reputation. It is Time, Inc.'s contention that the state interest referred to in *Gertz* is an interest in protecting reputation and that since Mrs. Firestone did not seek damages for claim to reputation, there was no state interest to protect and thus actual malice had to be proved. *Gertz* simply and plainly does not stand for that proposition. The legitimate state interest underlying the law of libel referred to in *Gertz* is "the compensation of individuals for the harm inflicted on them by defamatory falsehoods". *Gertz* p.17. This compensation, by way of a damage award, can be proved by a private individual by showing actual damages, rather than presumed damages. *Gertz* pp.25-26. As stated in *Gertz* p. 26:

> "We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehoods *include* impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (emphasis added)

In light of *Gertz*, the Florida Supreme Court stated:

> "Sub judice, the trial judge properly instructed the jury that if libel is proven by the greater weight of the evidence which caused actual damages to the plaintiff, they should award plaintiff an amount of money that will fairly and adequately compensate her for such damages, and instructed that 'It is only damages which are a direct and natural result of the alleged libel which may be recovered. If you find the plaintiff is entitled to recover damages, you may consider any shame, mortification, mental anguish, or hurt feelings experienced in the past or to be experienced in the future, if any, which you find from the evidence. There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in light of the evidence.' (emphasis supplied)

The jury heard the testimony and considered the evidence before it, and the factors enumerated in the instruction of the trial judge which are the same as those set out by the Supreme Court of the United States in Gertz, supra, and upon the

> evidence decided that a just and fair award for the damages suffered by petitioner would be $100,000. This award is supported by competent evidence concerning the injury. As aforestated, the Supreme Court of the United States in Gertz, supra, recognized that there need be no evidence which assigns an actual dollar value to the injury."

CONCLUSION

This case went to the jury and it decided that Time, Inc. was guilty of libeling Mrs. Firestone. Time, Inc. now wants this court to do what the Florida Supreme Court has refused to do, and that is to hold as a matter of law that Time, Inc. had a license to publish to the nation that Mrs. Firestone was found guilty of adultery. Time, Inc.'s attitude towards this case and its "license to libel" is clearly reflected at page 20-21 of its petition where it states that it is constitutionally protected "to say what it pleases", unless the injured citizen and *victim* can prove actual malice. However, as shown, *supra*, mere negligence was the applicable standard of proof not actual malice. Time, Inc. "said what it pleased" and was found to have done so negligently. How can it now complain?

It is evident that the decision of the Florida Supreme Court is clearly in line with the libel cases handed down by this Court from *New York Times* through *Gertz*. It is submitted that the petition for writ of certiorari should be summarily denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Harold R. Medina, Jr., One Chase Manhattan Plaza, New York, New York, 10005, by mail, this _____ day of _____, 1975.

By _____
ROBERT M. MONTGOMERY, JR.
and
EDNA L. CARUSO

RESPONDENT'S APPENDIX A

TIME, INC.'S ARGUMENT IN ITS BRIEF TO THE FOURTH DISTRICT COURT OF APPEAL

POINT III

IF THERE IS A CAUSE OF ACTION, PLAINTIFF'S PROOF WAS INSUFFICIENT UNDER THE DOCTRINE OF *NEW YORK TIMES V. SULLIVAN.*

Under the *New York Times* doctrine it is the plaintiff's burden to prove actual malice — that is, that defendant published with knowledge of falsity or with serious doubts as to truth. *New York Times Co. vs. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968). Ordinarily that will involve use of the defendant's employees and records. That is the very standard which this Court held applicable in the prior appeal of this case. As such, it was the law of the case to govern all further proceedings. Notwithstanding, the trial court failed to follow those requirements at the trial of this.

Moreover, even without any prior adjudications, the undisputed facts of this case clearly show that the *New York Times* doctrine was applicable. This was the report of the Final Judgment in litigation which had been initiated by the plaintiff. That litigation had received widespread and prominent press coverage throughout its stormy history, much of which consisted of direct quotes from the plaintiff. As the culmination of the litigation, the Final Judgment had been long awaited and was immediately flashed throughout the nation by the Associated Press wireservice. And, it was immediately published in the New York Daily News, a further indication of the

wide-spread public interest involved. (Def. Ex. No. 3). In addition to the fact that, as an official circuit court order, the Final Judgment was a matter of public interest, the evidence conclusively showed that the Plaintiff, as the wife of the Firestone tire heir, was a prominent public personage who was continuously in the "public eye". Unquestionably, under these circumstances the *New York Times* doctrine applies.

The *New York Times* decision involved, of course, only a "public official". However, both the Florida and Federal courts have now made it quite clear that the standards of that decision apply to any publication involving *a matter of public interest.*

The Florida decisions are *Bishop v. Wometco Enterprises Inc.*, 235 So.2d 759 (3rd DCA 1970), cert denied ..... So.2d ..... (Oct. 13, 1970, Case No. 39935) and *Gibson v. Maloney*, 231 So.2d 823 (1970).*

In *Gibson*, the *New York Times* doctrine was held applicable to:

> "fair comment" on a *public matter* relating in part to an individual who had by choice made himself newsworthy and a part of the passing scene. *Id.* at 826.

And in *Bishop*, *New York Times* was held applicable to an investigator who "testified at a public hearing before the Commission":

---

* There have also been numerous reported decisions of the circuit courts of Florida holding the same. E.g., *West v. Florida Pub. Co.*, 30 Fla. Supp. 1 (C.C. Duval 1968; *Cobb v. Florida Pub. Co.*, 31 Fla. Supp. 112 (C.C. Duval 1968) and *Merritt-Chapman & Scott v. Associated Press*, 33 Fla. Supp. 102 (C.C. Dade 1970).

> Whether he was a public official, a public figure, or whether he simply involved himself in a matter of public interest, or whether his *appearance and testimony* before the Miami City Commission was a matter of public interest, it is clear that the rule in New York Times Co. v. Sullivan, supra, applies, which requires proof that the alleged libels were published with " 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or not". Until there is proof of actual malice and unless that proof has the "convincing clarity which the constitutional standard demands", it is insufficient. (Emphasis added; Citations omitted). *Id.* at 761.

The Federal decisions, all holding that where there is *public interest in the publication* the *New York Times* doctrine applies, include: *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892 (1969); *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969) cert. denied, 395 U.S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968) cert. denied, 394 U.S. 921 (1969) and *Sellers v. Time, Inc.*, 299 F.Supp. 582 (E. D. Pa. 1969) aff'd 423 F.2d 887 (3rd Cir. 1970). Of particular relevance to the facts of this case are the decisions in *Rosenbloom and Sellers.*

Rosenbloom was a distributor of nudist magazines. He had been raided by the police and brought an action seeking to enjoin any further raids. In holding that the *Times* standard applied, the Court noted that those reports:

dealt with the *institution and development of a legal action by plaintiff* and two publishers against an influential segment of the news media (all major local newspapers and the local CBS-TV affiliate), as well as against the City of Philadelphia, its Police Commissioner, and its district attorney to end harassment of plaintiffs in the operation of their business. Again, it is clear to us that the *subject matter was of real public interest.* Indeed, *the Supreme Court has construed broadly the concept of a matter or an issue of public interest:*

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093. Time Inc. v. Hill, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed. 2d 456 (1967). (Emphasis added).

Sellers was a defendant in a personal injury action arising out of a golfing accident. The publication complained of, which appeared in "The Law" section of Time magazine, reported the denial of Sellers' motion for summary judgment in this case. Sellers sued for libel as a result of that publication and Time, Inc. defended on the grounds that the publication was "privileged under the common law rule of a fair report of judicial proceedings" and also on the grounds that it was protected under the *New York Times* doctrine. The District Court found that the Time publication fairly reported the result of the summary judgment proceeding and since it was a report of a judicial proceeding it was a *matter of public interest* and that it "came within the common law and constitutional privileges. . . ." It was held to be Sellers' burden to prove actual malice on the part of the defendant and on summary judgment the proof was held "as a matter of law" to be insufficient and summary judgment was entered for the defendant.

The publication here concerned a divorce in one of the most well-known families in this country. The litigation had been the subject of wide-spread coverage by the various news media. The plaintiff herself, as Rosenbloom, had instituted and developed the litigation and, as with Sellers, was a party to the litigation. The plaintiff herself, as Bishop, had testified in a public hearing. Thus it is clear that the *New York Times* doctrine applies to and governs this case.

As noted in *Bishop,* under the *New York Times* standard it is the plaintiff's burden to prove "actual malice" with convincing clarity. Actual malice consists of publication either with knowledge of falsity or "serious

doubts as to truth". *St. Amant v. Thompson*, 390 U.S. 727 (1968). Here the plaintiff's proof totally fails to meet those requirements. There was absolutely no evidence that any of defendant's employees had any knowledge of falsity or serious doubts as to truth. To the contrary they all testified that they believed at the time and still today that the publication was truthful and accurate. Indeed, as laymen, without legal training, there could be no reason for them to have any other conclusion. Since there is no evidence to meet the standards of *New York Times* which controls this case, the judgment below should be reversed with directions to enter judgment for the defendant.

RESPONDENT'S APPENDIX B

TIME, INC.'S ARGUMENT IN ITS BRIEF TO THE FLORIDA SUPREME COURT

ARGUMENT

POINT I

PLAINTIFF'S PROOF WAS INSUFFICIENT UNDER THE DOCTRINE OF *NEW YORK TIMES vs SULLIVAN*

In plaintiff's brief in support of her petition for Writ of Certiorari no complaint was made of the District Court's holding that the constitutional privilege, detailed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny, is applicable to this case. Now, in her brief on the merits, plaintiff argues that that holding is erroneous. That argument completely misconceives the law.

This action was commenced in 1968. In 1966 this same plaintiff had commenced an action, based on a publication in Life, against this same defendant. In each of these cases plaintiff predicated her claim upon common law libel grounds with the unwarranted assertion both that the Constitution of the United States is not applicable to give protection in these cases because the articles did not deal with *matters of public interest* and that, in any event, defendant did not qualify for constitutional protection because plaintiff had proved, "with convincing clarity", both falsity and knowledge of falsity or serious doubts as to truth, the latter argument in essence being simply a negligence theory.

Plaintiff's argument on *public interest* clearly van-

ished with the decision in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Indeed, when the decision of a Florida Circuit Court ceases to be of *public interest*, our courts imagine a clearer case of *public interest*.

Plaintiff, in relying upon a negligence standard, disregards that negligence is plainly not the test under the Constitution, as clearly enunciated by the Supreme Court in *New York Times v. Sullivan, Id.* at 288 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964); *Times, Inc., v. Hill*, 385 U.S. 374, 389 (1967); *St. Amant v. Thompson*, 390 U.S. 727, 731-732 (1968) and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50-51 (1971).

Plaintiff has advanced essentially the same arguments in both these actions. Both points in the Life article case were rejected by the United States Court of Appeals for the Fifth Circuit in *Firestone v. Time, Inc.*, 460 F.2d 712 (April 20, 1972). Plaintiff carefully omits to point out that certiorari in that action was denied by the Supreme Court of the United States on October 10, 1972. The District Court of Appeals below in this action has reached essentially the same conclusion as to both points.

We turn, in more detail, to the specific points involved, *i.e.*, application of constitutional protection and qualification for constitutional protection.

A. *Application of constitutional protection — public interest.*

As long the publication "concerns a *matter of public or general interest*" constitutional protection applies. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir. 1972), *cert. denied* ____ U.S. ____, Oct. 10, 1972; *Gibson v. Maloney*, 263 So.2d 632 (1st D.C.A. 1972); *Bishop v. Wometco Enterprises, Inc.*, 235 So.2d 759 (3rd D.C.A. 1970), *cert. denied* 240 So.2d 813.

Particular note should be made of the decision in *Firestone v. Times, Inc., supra.* There the district court judge made a specific finding, as did the trial judge here, that "the plaintiff's private marital difficulties' did not come within the scope of the *New York Times* doctrine. That finding was specifically reversed on the basis of *Metromedia.**

The same result must follow here. This was the report of the Final Judgment in litigation which had been initiated by the plaintiff. That fact alone qualifies for application of the *New York Times* doctrine. *Rosenbloom v. Metromedia*, 415 F.2d 892 (3rd Cir. 1969), aff'd 403 U.S. 29; *Sellers v. Time, Inc.*, 299 F.Supp. 582 (E.D. Pa. 1969), aff'd 423 F.2d 887 (3rd Cir. 1970), *cert. denied* 400 U.S. 830 (1970); *Bishop v. Wometco Enterprises, Inc., supra.* As noted in *Bishop:*

> Whether he was a public official, a public figure, or whether he simply involved himself in a mat-

* The Metromedia clarification that "public interest" was the pivotal point for application of the doctrine had in fact been apparent from the outset. E.g., *New York Times Co. v. Sullivan*, at 269; *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *United Medical Lab. v. CBS*, 404 F.2d 706 (9th Cir. 1968), *cert. denied* 394 U.S. 921 (1969); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969) *cert. denied* 395 U.S. 922; *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970); *Dacey v. The Florida Bar*, 427 F.2d 1292 (5th Cir. 1970); *Davis v. National Broadcasting Company*, 320 F.Supp. 1070 (E.D. La. 1970), aff. 447 F.2d 981 (5th Cir. 1971). There have also been numerous reported decisions of the circuit court of Florida holding the same. E.g., *West v. Florida Pub. Co.*, 30 Fla. Supp. 1 (C. C. Duval 1968); *Cobb v. Florida Pub. Co.*, 31 Fla. Supp. 112 (C. C. Duval 1968) and *Merritt-Chapman & Scott v. Associated Press*, 33 Fla. Supp. 102 (C.C. Dade 1970).

> ter of public interest, or whether his *appearance and testimony* before the Miami City Commission was a matter of public interest, it is clear that the rule in New York Times Co. v. Sullivan, supra, applies, which requires proof that the alleged libels were published with " 'actual malice' — that is, with knowledge that it was false or not". Until there is proof of actual malice and unless that proof has the "convincing clarity which the constitutional standard demands", it is insufficient. (Emphasis added; Citations omitted). *Id.* at 761.

If possible, the application of the *New York Times* doctrine here is even clearer for this was not just any judicial proceeding. The parties enjoyed national prominence. The case involved one of this nation's most well-known families and greatest fortunes. The testimony was "colorful" and "sensational". There was national news coverage of the progress of the case. Plaintiff, all during her married life, and even prior thereto, commanded extensive news media attention. And, during her litigation she encouraged and voluntarily joined in the media coverage. Indeed, even this Court's opinion concerning that litigation was a national news item and the subject of an Associated Press Dispatch. See, for example, Miami Herald, April 14, 1972, p. 2C, col. 1, 2, 3, and New York Times, April 15, 1972, p. 21, col. 4.

The public status of plaintiff's marital litigation thus narrows the inquiry to whether plaintiff's proof was sufficient under the *New York Times* doctrine. The answer is clearly no.

Supreme Court, U. S.
FILED
MAR 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-944

TIME, INC.,
Petitioner,

v.

MARY ALICE FIRESTONE,
Respondent.

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-944

TIME, INC.,
Petitioner,

v.

MARY ALICE FIRESTONE,
Respondent.

REPLY BRIEF FOR PETITIONER

Since respondent raises jurisdictional and other contentions which lack merit, we submit this short reply.*

ARGUMENT

1. This Court has jurisdiction.

Respondent argues that the initial rejection of petitioner's federal constitutional claims in the Florida Supreme Court's decision of 1972 is final, and, since no review was sought by petitioner at that time, review is now foreclosed. This contention is clearly erroneous. That the constitutional issues raised by petitioner were directly involved and intertwined with the merits of respondent's basic claim is not open to question. In addition, as respondent singularly

*The 1974 opinion of the Supreme Court of Florida (App. C to petition) has now been officially reported at 305 So. 2d 172.

fails to note, those constitutional issues continued throughout the litigation and were not finally rejected until the Florida Supreme Court's second decision in 1974. Thus, when the Florida Supreme Court ruled adversely to petitioner on the constitutional issues in its first opinion of 1972 and remanded the case for resolution of common law issues, final judgment in the case had not yet occurred.

In that first decision petitioner's constitutional claims were rejected on the ground that petitioner's report was "not constitutionally protected as being matters of *real* public or general concern." (Pet., p. A15, italics added). At that time the test for constitutional protection was public interest, *Metromedia,* a test subsequently mooted by *Gertz.** Following the remand to the District Court of Appeal "to pass on the full merit of the remaining points raised" (Pet., p. A16), all of which had been previously decided in petitioner's favor by the District Court of Appeal, that Court adhered to its earlier decision on those points and again directed judgment for petitioner (Pet., p. B10). The Florida Supreme Court then rendered its second decision (Pet., App. C), again reversing the District Court of Appeal, and again rejecting petitioner's federal constitutional claims, this time relying on the intervening *Gertz* decision in support of the reversal—both as authority for the award of damages despite the fact that respondent had withdrawn her

*The public official test of *New York Times,* extended to public figures in *Butts,* was expanded to matters of public interest in *Metromedia.* Subsequently, *Gertz* cut back the constitutional protection for defamation of persons who are neither public officials nor public figures to the "less demanding" standard of negligence instead of the "actual malice" standard of *New York Times.*

We repeat, in this reply, for brevity and clarity the shorthand reference to First Amendment decisions of this Court utilized in the petition. We have added *Associated Press* v. *Walker,* 388 U. S. 130, *Cantrell* v. *Forest City Publishing Co.,* —U. S.—, 95 Sup. Ct. 465 and *Cox Broadcasting Corp.* v. *Cohn,* —U. S.— (No. 73-398, decided March 3, 1975).

claim for damage to reputation (Pet., pp. C6-C8), and as authority for the conclusion that petitioner's publication was "a flagrant example of 'journalistic negligence' " (Pet., p. C10). In so holding and directing entry of final judgment for respondent, the Florida Supreme Court imposed liability without fault contrary to the commands of the First and Fourteenth Amendments, as pointed out in the petition (pp. 11-15). The jurisdiction of this Court is accordingly clear since petitioner's constitutional claims, initially rejected by the first decision of the Florida Supreme Court, were again and finally rejected by the second decision of that Court. Thereby, *for the first time,* a final judgment was entered in the case, disposing of all the constitutional and other issues involved in the litigation, and satisfying the prerequisites for seeking review in this Court.*

The fact that the Florida Supreme Court considered the constitutional issues in both of its decisions makes it unnecessary to determine whether petitioner could or should have sought review in 1972 of the first decision as a "final" judgment under 28 U. S. C. § 1257. However, since the subsequent recent decisions of this Court in *Tornillo* and *Cox Broadcasting* suggest the possibility that petitioner might have been able to obtain review of the first decision, in view of the substantial claims presented under the First and Fourteenth Amendments, it is appropriate to note the following.

*Although both decisions of the Florida Supreme Court are before this Court for review, it is sufficient that this Court has jurisdiction over the second decision. The federal claims under the First and Fourteenth Amendments presented by petitioner were disposed of in that decision by the holding that petitioner was negligent and that respondent was entitled to damages under *Gertz.* Accordingly, the jurisdiction of this Court to consider the federal question in all its aspects is clear, and petitioner can advance any theories or arguments in support of the federal question even though they were not raised or considered below. *See* Stern and Gressman, *Supreme Court Practice* (4th ed. 1969), pp. 127 and 131 and cases there cited.

As this Court has recognized, "finality" is not an exact or mechanical concept and it is accordingly necessary to take a "pragmatic approach" (*Cox Broadcasting,* slip op., pp. 7, 17). Petitioner took such a pragmatic approach here. It had prevailed in the District Court of Appeal on four other dispositive points on the merits in addition to the federal constitutional question, and it expected to continue to prevail on the remand without the necessity of this Court's intervention. Indeed, petitioner did prevail again in the District Court of Appeal, and it would have prevailed in the Florida Supreme Court if that court had not mistakenly applied this Court's *Gertz* decision to support its second reversal. The *Tornillo* and *Cox Broadcasting* precedents were, of course, not available when the Supreme Court of Florida rendered its first decision in December, 1972, and the other categories in which the requirement of "finality" had been relaxed to permit review before the conclusion of proceedings in the state courts, as explained in *Cox Broadcasting,* did not apply.*

*This case does not fit into the first category discussed in *Cox Broadcasting* (slip op., p. 9), because the outcome of the further proceedings was not "preordained". As pointed out above, petitioner had previously prevailed on other dispositive points, did so again on the remand, and lost in the final decision of the Florida Supreme Court when that court continued to misapply the constitutional decisions of this Court.

Nor does this case fit into the second category described in *Cox Broadcasting* (pp. 10-11) for, unlike the cases in that category, the further state court proceedings ordered here could "foreclose or make unnecessary decision on the federal question."

The third category is also inapplicable because this is not a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case" (*Cox Broadcasting,* p. 11). If the further proceedings were decided adversely to petitioner, as they eventually were, its federal claims could still be brought here for review.

Nor is this case like the fourth category (*Cox Broadcasting,* pp. 12-14) where an issue separable from the merits was involved as to the forum in which the matter should proceed and "the case was for all practical purposes concluded in the state tribunals."

Moreover, it is one thing to hold that a litigant may seek early review of a state court decision because otherwise such decision "might seriously erode federal policy" (*Cox Broadcasting,* p. 13). But it is quite a different matter to hold that a litigant is precluded from review if he waits for the end of the state court litigation before bringing his federal claims to this Court. Finality is too practical a doctrine to be turned into such a trap for litigants and such an erosion of this Court's jurisdiction to pass on substantial federal claims in state court cases. Nothing in this Court's decision in *Cox Broadcasting* suggests such results. Quite to the contrary—the finality principles utilized in the *Tornillo* and *Cox Broadcasting* cases were designed to serve the constitutional guarantee of a free press by avoiding the harm involved in leaving the press "operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt" (*Cox Broadcastng,* pp. 16-17). It would be ironic, indeed, to employ these principles, which were designed to protect a free press, to cut off review of the substantial First Amendment claims presented here. Such a result is not required. Nor should it be permitted, particularly since those claims involve the very function of the press that *Cox Broadcasting* emphasizes is specially "protected"—*i.e.,* the right of the press to make accurate reports of judicial proceedings without sanction for publishing them.

2. Respondent's other contentions similarly lack merit.

a. Report of judicial proceedings.

Respondent has no satisfactory answer to our argument that review is required to protect the constitutional right of the press to report judicial proceedings—a right since emphasized by the intervening decision in *Cox Broadcasting, supra,* as entitled to special protection. The fact of the

matter is that, with a report of judicial proceedings, the standard must be "actual malice". Indeed, this was suggested by Mr. Justice White in his concurring opinion in *Rosenbloom* (403 U. S. at 61, 62):

> ". . . Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place. In the present case, for example, the public would learn nothing if publication only of the fact that the police made an arrest were permitted; it is also necessary that the grounds for the arrest and, in many circumstances, the identity of the person arrested be stated. In short, it is rarely informative for a newspaper or broadcaster to state merely that officials acted unless he also states the reasons for their action and the persons whom their action affected."

> "I would accordingly hold that in defamation actions, absent actual malice as defined in *New York Times Co.* v. *Sullivan,* the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view."

That doctrine has now been implicitly approved by this Court in *Cox Broadcasting, supra.* For that decision clearly holds (slip op., pp. 25-26):

> ". . . In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.
>
> "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the press to inform their readers about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be put into print and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. *See Miami Herald Publishing Co.* v. *Tornillo, supra,* at 258." (Footnote omitted.)

Respondent conveniently overlooks, among other things, the specific finding by the District Court of Appeal in its third opinion in this case that:

"The publication fairly and accurately reported the final judgment [in the divorce proceeding]" (Pet., p. B10).

Petitioner accordingly cannot be held constitutionally liable for its report of the Firestone divorce proceedings. That report was accurate and truthful.* And, even if it was in error, it was published without "actual malice".

b. Public figure.

Respondent argues, as a reason for denying the writ, that the public figure issue is being now raised for the first time. There are two dispositive answers to this erroneous argument:

First, it is completely contrary to the record. Petitioner argued public figure throughout, from the trial court to the second decision of the Florida Supreme Court.**

Second, it is immaterial whether petitioner argued public figure below. The federal question under the First and Fourteenth Amendments having been properly raised below, petitioner may urge and this Court may consider any arguments upon the federal question, for, as said in *Dewey* v. *Des Moines,* 173 U. S. 193,

*Totally aside from the rightness or wrongness of petitioner's report, it was an interpretation. Compare *Gertz,* p. 339, "Under the First Amendment there is no such thing as a false idea".

**The point was consistently presented, *inter alia,* in petitioner's pretrial statement, its requests for instructions, its motions for directed verdict and new trial, its briefs on appeal (including the extracts attached to respondent's brief in opposition—see pp. 23-24 of Appendix A and p. 32 of Appendix B to that brief which amply show that petitioner was relying on the public figure argument), and its supplemental brief, submitted to the Florida Supreme Court on the second appeal, following the decision of this Court in *Gertz.* Petitioner also submitted proof as to public figure in the form of affidavits showing the extensive prior publications regarding respondent in the *Miami Herald, Palm Beach Post* and *Palm Beach Times.* The public figure matter was also discussed in the 1971 decision of the District Court of Appeal (Pet., p. G7) and in the first decision of the Florida Supreme Court (Pet., pp. A12-A15).

198, "[p]arties are not confined here to the same arguments which were advanced in the [state] courts below upon a Federal question there discussed."

c. Liability without fault.

In arguing that the Supreme Court of Florida did not impose liability without fault, respondent erroneously relies on a supposed conflict between Delaney, petitioner's Palm Beach "stringer", and Farish, attorney for respondent, with respect to the statement in Delaney's dispatch of December 16, 1967 (Pl. Ex. 4), that the "technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery".

To begin with, there is no conflict between Farish and Delaney. Farish testified explicitly that "I said Mr. Firestone had accused her of extreme cruelty and adultery" (T. 87) and agreed that he and Delaney had discussed that "the technical grounds for divorce as alleged in the complaint were adultery and extreme cruelty" (T. 104). Once this testimony is placed in context with the clear language of the opinion and judgment which was being reported ("defendant's counterclaim for divorce be and the same is hereby granted"— T. 103) the inescapable conclusion is that the grounds upon which the divorce was granted were extreme cruelty and adultery. No amount of argument can gainsay that fact, particularly when the opinion specifically noted, as reported in Duncan's (Miami bureau head) first dispatch (Def. Ex. 2), that the "extramarital escapades of plaintiff" sufficed "to have made Dr. Freud's hair curl". There is no conflict.

Moreover, Delaney's knowledge is not pertinent to the constitutional inquiry. Precisely the same state of facts with respect to the knowledge of a reporter was presented to this Court in *Walker* in which the Associated Press

relied on its reporter in the field. In dismissing that action, despite the fact that the reporter's testimony differed from that given by plaintiff Walker so that if the reporter's knowledge were relevant there was created an issue of fact sufficient to bar judgment for defendant, this Court disregarded the reporter's knowledge and stated (388 U. S. at 158):

> "... The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. ..."

To the same effect, see *Walker* v. *Pulitzer Pub. Co.*, 394 F. 2d 800, 805 (8th Cir. 1968), and *Firestone* v. *Time, Inc.*, 460 F. 2d 712, 721 (5th Cir.), *cert. denied*, 409 U. S. 875 (1972).*

This Court's recent decision in *Cantrell* v. *Forest City Publishing Co.*, U. S. , 95 Sup. Ct. 465 (1974), further shows the fallacy of respondent's contention. There this Court held that the knowledge of the staff writer, Eszterhas, was the knowledge of his employer Forest City Publishing Company (95 Sup. Ct. p. 470) just as, of course, the knowledge of the New York editorial staff of petitioner would be implied to petitioner, for researcher Nadasdy, writer Doerner and editor Daniels were the persons "responsible for publication" (*New York Times*, p. 287). By the same token, this Court in *Cantrell* dismissed the action against photographer Conway on the ground that he "was not shown to have participated" in the editorial process (95

*The Fifth Circuit *Firestone* case was a prior action brought by Mary Alice Firestone with respect to a Life article, also published by petitioner. There, however, the Fifth Circuit, unlike the Florida Supreme Court, protected petitioner's First Amendment rights so that there was no need for action by this Court and this Court, quite correctly, denied respondent's petition for certiorari.

Sup. Ct. p. 470). Delaney is in the same posture. Since he did not participate in writing or editing the report, his knowledge will not be implied to petitioner and is immaterial to the constitutional inquiry.

In this case, the ample precautions taken by petitioner in publishing the Milestones item clearly negate any finding of "actual malice". These exhaustive precautions also clearly constitute compliance with the standard of "reasonable conduct in the light of the apparent risk"* and thus preclude any finding of negligence.

The burden is, of course, on respondent to prove that petitioner was at least negligent in the sense of the constitutional standard mandated by *Gertz*. (This point need never be reached if petitioner's "public figure" and "report of judicial proceedings" arguments are accepted.) If this were an ordinary negligence case, respondent would have to carry that burden by a preponderance of the evidence—*see, e.g., Prosser on Torts* 208-09 (4th ed. 1971). But because First Amendment rights are involved here, respondent has the burden of showing negligence with "convincing clarity". That is the burden which public officials or public figures must carry to prove the "actual malice" required by the *New York Times* rule; not only must they prove "actual malice", but they must do so with "the convincing clarity which the constitutional standard demands. ..." 376 U. S. at 285-86. The requirement of negligence which *Gertz* applies to private defamation plaintiffs, although "less demanding" than the "actual malice" requirement of *New York Times*, is also a constitutional standard and private plaintiffs must accordingly prove negligence with "convincing clarity".

Respondent cannot show that petitioner was negligent here under any standard of proof, let alone by proof of

Prosser on Torts 324 (4th ed. 1971).

"convincing clarity". The fact remains, as pointed out in the petition (pp. 11-15), that liability without fault was imposed on petitioner, contrary to the command of the First Amendment.

d. Pape.

Respondent's attempt to distinguish the decision by this Court in *Pape* is of no avail. The article involved in the *Pape* case reported on a Civil Rights Commission report in the identical way that the article involved in this case reported on a Florida Circuit Court decision, *i.e.*, Judge Knott's opinion. In each instance it was necessary that the article interpret that which was being reported on—and in each instance the article was a "rational interpretation" (*Pape*, p. 230).

e. Hill.

Respondent conveniently does not answer our basic point that, once her claim for damage to reputation was withdrawn, she stands in the same posture as plaintiff *Hill* so that the same standard must be applied, *i.e.*, "actual malice". Moreover, respondent's quotation (Br. pp. 18-19) from *Gertz* (p. 341) ignores language thereafter appearing in *Gertz* emphasizing that reputation is the protected interest—*e.g.*, "the state law right to compensation for wrongful hurt to one's ***reputation***" (p. 343), "adverse impact on ***reputation***" (p. 343), and "the legitimate state interest in compensating private individuals for wrongful injury to ***reputation***" (p. 348), as well as the statement "the strong and legitimate state interest in compensating private individuals for injury to ***reputation***" (pp. 348-49). (Emphasis has been supplied.)

CONCLUSION

For reasons stated here and in the petition, the petition should be granted.

March 6, 1975.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAY 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-944

TIME, INC., PETITIONER,

v.

MARY ALICE FIRESTONE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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TIME, INC., PETITIONER,

v.

MARY ALICE FIRESTONE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

OPINIONS BELOW

The first opinion of the Florida Supreme Court initially rejecting petitioner's Federal constitutional claims and remanding the cause to the District Court of Appeal for consideration of state law issues, (A. 594) is reported at 271 So. 2d 745. The subsequent opinion of the District Court of Appeal on that remand, holding for petitioner on the state law issues and directing entry of judgment in favor of petitioner, (A. 611) is reported at 279 So. 2d 389. The second opinion of the Florida Supreme Court, finally rejecting petitioner's Federal constitutional claims, quashing the decision of the District Court of Appeal in favor of petitioner, and remanding the cause with directions to reinstate the jury verdict and enter final judgment thereon in favor of respondent, (A. 621) is reported at 305 So. 2d 172.*

*Opinions and orders of the lower courts, prior to the first opinion of the Florida Supreme Court, are, in chronological order, as follows: The original opinion of the Trial Court granting summary judgment for petitioner, is not officially reported. The first opinion of the District Court of Appeal reversing that grant of summary judgment, is reported at 231 So. 2d 862. The judgment in favor of respondent following trial and jury verdict (A. 575), is not officially reported. The second opinion of the District Court of Appeal (A. 585), holding for petitioner on Federal constitutional and state law grounds, and reversing and remanding with instructions to enter judgment in favor of petitioner, is reported at 254 So. 2d 386. That opinion was followed by the two opinions of the Florida Supreme Court and the intervening opinion of the District Court of Appeal described above in the text.

JURISDICTION

The final opinion and order of the Supreme Court of Florida, quashing the decision of the District Court of Appeal in favor of petitioner and directing final judgment in favor of respondent was entered December 11, 1974 (A. 621). The petition for a writ of certiorari was filed January 31, 1975, and was granted April 14, 1975. The jurisdiction of this Court rests on 28 U. S. C. § 1257(3) on the ground that there is involved and petitioner claims the right to privilege and immunity protection under the Constitution of the United States.*

---

*The petition brings before this Court both decisions of the Florida Supreme Court—the first decision which initially rejected petitioner's Federal constitutional claims, and the second decision which finally rejected those claims and disposed of the state law issues.

In opposing the petition, respondent argued specifically that this Court lacks jurisdiction to review the first decision, and inferentially that it lacks jurisdiction to review the case at all, because petitioner should have sought review in this Court when the first decision was entered in December 1972 (Br. Opp. 2-4, 10). Our reply brief pointed out (1-5) that this argument was clearly erroneous and that this Court has jurisdiction because, *inter alia*: (1) there was no final judgment until the second decision was entered December 11, 1974, adversely disposing of the constitutional and state law issues previously decided in petitioner's favor; (2) the second decision also passed on petitioner's Federal constitutional claims, and petitioner can advance and this Court can consider any arguments in support of those claims even though they were not raised or considered below; and (3) the possibility that petitioner might have obtained review following the first decision under the principles subsequently announced in the intervening decisions of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Cox Broadcasting Corp.* v. *Cohn*, U. S. , 95 Sup. Ct. 1029 (March 3, 1975), does not deprive this Court of jurisdiction to consider petitioner's Federal constitutional claims in all of their aspects following the conclusion of the state court litigation.

Since this Court granted certiorari without directing the parties to argue any question as to jurisdiction, we assume that this Court is satisfied that it has jurisdiction. If this assumption should be incorrect, we request the opportunity to brief the reasons why the jurisdiction of this Court is clear.

QUESTIONS PRESENTED

1. Was the Supreme Court of Florida in error under the First Amendment because it imposed liability without fault with respect to a routine news item reporting a judicial decision accurately, carefully and competently?

2. Was petitioner's news item a rational interpretation of an ambiguous judicial opinion and thus entitled to First Amendment protection so that failure of the Supreme Court of Florida to affirm dismissal of the action was error?

3. Was the Supreme Court of Florida in error because of its failure (a) to impose an "actual malice" standard of proof under the First Amendment upon a plaintiff who had instituted and been drawn into a particular public controversy which commanded a substantial amount of independent public interest and who brought suit with respect to a routine news item reporting accurately, carefully and competently a judicial decision that was given nationwide coverage because of the prominence of the parties involved in that particular public controversy, and (b) under that standard to affirm dismissal of the action?

4. Did respondent's explicit withdrawal of any claim for damage to reputation arising from a routine news item reporting a judicial decision make mandatory imposition of an "actual malice" standard of proof under the First Amendment so that the failure of the Supreme Court of Florida to impose that standard and affirm dismissal of the action was error?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments. United States Constitution, Amendment I, Amendment XIV § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," U. S. Const., amend. I.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner is the publisher of the weekly newsmagazine, TIME. Respondent brought this action for libel based on an item which appeared in the Milestones section of TIME dated December 22, 1967, but which closed on Saturday, December 16, 1967, concerning a decision of the Circuit Court, Palm Beach County, Florida, rendered December 15, 1967. The item stated as follows (Pl. Ex. 1, A. 96, 522):

> "Divorced. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone,

> 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'"

The decision thus reported was rendered on Friday, December 15, 1967, at 4:39 p.m. At 6:52 p.m. that evening petitioner received an AP dispatch which, in pertinent part, read as follows (Def. Ex. 1, A. 99, 543):

> "WEST PALM BEACH, Fla. AP—Millionaire industrial heir Russell A. Firestone Jr. was granted a divorce Friday from his third wife, a former West Palm Beach school teacher he had accused of adultery and extreme cruelty."

Later that evening petitioner received the New York Daily News for December 16, 1967, which, in pertinent part, read as follows (Def. Ex. 3, A. 406, 545):

> "West Palm Beach, Fla., Dec. 15 (Special)—The stormy, scandal-ridden divorce trial of millionaire Russell A. Firestone Jr. ended today when the rubber and oil heir was granted a divorce from his third wife, a statuesque onetime West Palm Beach schoolteacher, who had been accused of adultery."

On December 16, 1967, in response to a query sent to petitioner's Miami bureau, petitioner received a dispatch at 11:52 a.m. from Richard Duncan, head of that bureau, which in pertinent part, read as follows (Def. Ex. 2, A. 230, 544):

> ". . . Judge James Knott commented: 'According to certain testimony in behalf of the defendant (Rus-

sell), extra marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in the plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr.'"

Finally, at 1:25 p.m. on December 16, 1967, petitioner received a dispatch from Robert Delaney, Palm Beach "stringer" working on a special assignment basis, which, in pertinent part, read as follows (Pl. Ex. 4, A. 101, 532):

> "... The technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery. ..."

Based on those two items and two dispatches, the TIME editorial team, consisting of Ursula Nadasdy, researcher, William Doerner, writer, and George Daniels, Sr. Editor in charge of the Milestones section of TIME magazine, wrote, edited and checked for accuracy the item on which suit was brought. All testified at the trial as to their complete belief in the truth of the news item both at the time of the publication and at the time of the trial (A. 239-41, 267, 304, 338-39).

The actual opinion in *Firestone* v. *Firestone*, on which report was made in TIME's Milestones item but which the editorial personnel had not seen prior to publication, is essentially the same as the two news items and two dispatches on which the TIME item was based. If one excludes those portions of the opinion which merely give the fact of marriage and residence, deal with financial disputes between the parties or cite authority, the opinion reads as follows (Pl. Ex. 2, A. 96, 523-29):

"This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), *the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery,* and the wife's answer thereto setting up certain affirmative defenses. ... (Italics added)

"....

"According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated. ...

"....

"In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

"....

"ORDER AND ADJUDGED as follows:

"1. That the equities in this cause are with the defendant; *that defendant's counterclaim for divorce be and the same is hereby granted,* and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved. (Italics added)

". . . .

"4. That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff."

After demand for retraction (A. 541) was made and refused, this action was commenced March 12, 1968, based on respondent's contention—squarely belied by the express statements in the divorce court's opinion that the husband's "counterclaim for divorce on grounds of extreme cruelty and adultery" was "hereby granted"—that she had not lost the divorce case on the ground of adultery and, for that reason, her reputation had been damaged (A. 8).* Based on the facts above stated, petitioner moved for summary judgment on First Amendment grounds, as made applicable to the States by the due process clause of the Fourteenth Amendment (A. 13).** That motion was granted by the trial court November 15, 1968, on the ground that "defendant's thorough investigation of the facts, prior to publication of the article conclusively shows a lack of malice or recklessness". The District Court of Appeal reversed January 26, 1970 (231 So. 2d 862), on the ground that summary judgment was not available as a procedural device in Florida where state of mind was an issue.

*Long after the publication in 1967 and the commencement of this action in 1968, the divorce decree was upheld on appeal. The District Court of Appeal affirmed without opinion in 1971. 249 So. 2d 719. The Supreme Court of Florida also affirmed in 1972, but with modifications, stating in its opinion that "lack of domestication" was not a ground for divorce, but that the decree could be sustained on the ground of "extreme cruelty", and gratuitously adding that the trial court had not found the wife guilty of adultery. 263 So. 2d 223.

**In its answer to the complaint petitioner asserted that the publication in suit was protected by the constitutional guarantees of freedom of the press embodied in the Constitution (A. 11); that Federal constitutional claim was properly preserved and passed upon as noted in the text which follows.

Final preparation for trial was then begun with two significant occurrences. First, the trial court, despite proof of the prominent press coverage which respondent and her marital litigation had received (A. 37-76), ruled that no constitutional issue was presented (A. 78). Second, after it became apparent that petitioner was going to meet vigorously the issue of damage to respondent's reputation, respondent was allowed to withdraw her claim for damage to reputation and to proceed "simply on the mental pain and anguish of Mrs. Firestone" (A. 77,444). The trial then proceeded, with all First Amendment objections renewed and reserved throughout, and resulted in a jury verdict of $100,000 for respondent, with a significant jury finding that no punitive damages would be allowed (A. 566).

On appeal the District Court of Appeal reversed on four common law grounds and, also, on the basis of the First Amendment, stating with respect to the latter (254 So. 2d at 389-90, A. 592-93):

"Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth.

* * *

"It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of

each news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it."

The Court's constitutional holding was grounded on its conclusion "that the divorce of Mary Alice Firestone was an event of great public interest"; it noted that she was possibly "a public figure" but said "we need not go that far to substantiate our result." (254 So. 2d at 389, A. 591)

The Supreme Court of Florida granted certiorari and reversed (271 So. 2d 745, A. 594) solely on the constitutional ground. Despite noting that respondent and her husband were "well known" and "prominent", that their divorce action was "a veritable *cause celebre*" which received national news coverage and "was unquestionably newsworthy", (271 So. 2d at 751-52, A. 605-06, 608) the Court inexplicably held that reports of the Firestone divorce "were not constitutionally protected as being matters of *real* public or general concern." (271 So. 2d at 752, A. 608, italics added). The Court did not consider other reasons warranting constitutional protection, such as whether respondent was a public figure, the fact that petitioner's news item was a report of judicial proceedings, and that it was in any event a reasonable interpretation of an ambiguous document. Instead, the Florida Supreme Court remanded the case to the District Court of Appeal for further consideration of the four common law issues. On remand, the District Court of Appeal adhered to its prior decision in favor of petitioner on those issues (279 So. 2d 389, A. 611). The Florida Supreme Court thereupon again granted certiorari and rendered its final decision, reversing and directing the entry of final judgment for respondent, and again rejecting petitioner's Federal constitutional claims, this time invoking the intervening decision of *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323

(1974), in support of the reversal—both as authority for the award of damages despite the fact that respondent had withdrawn her claim for damages to reputation, and as authority for the conclusion that petitioner's publication was "a flagrant example of 'journalistic negligence.'" (305 So. 2d 172, 176-77, 178, A. 627-28, 630). Petitioner accordingly now seeks reversal of the holdings of the Florida Supreme Court denying its claims to constitutional protection.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The decisions of the Florida Supreme Court and its final judgment upholding the $100,000 verdict in favor of respondent must be set aside because they contravene the constitutional decisions of this Court beginning with *New York Times* in several respects. They impose liability with-

*When the Florida Supreme Court rendered its first decision, the doctrine of *New York Times* had been expanded to matters of "public or general interest" by *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). By the time of the second Florida Supreme Court decision *Gertz* had cut back the constitutional protection for defamation of persons who are neither public officials nor public figures to the "less demanding" standard of negligence instead of the "actual malice" standard of *New York Times*.

For brevity and ease of reading, we shall refer in this brief to the First Amendment decisions of this Court by their shorthand names, *i.e.*, *New York Times*, *Butts*, *Gertz*, etc. Decisions so referred to include *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967); *Associated Press* v. *Walker*, 388 U. S. 130 (1967); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968); *Greenbelt Cooperative Pub. Ass'n* v. *Bresler*, 398 U. S. 6 (1970); *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971); *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); *Cantrell* v. *Forest City Publishing Company*, 419 U. S. 245 (1974); *Cox Broadcasting Corp.* v. *Cohn*, U. S. , 95 Sup. Ct. 1029 (1975).

out fault, contrary to *Cox Broadcasting* and *Gertz*. They impose liability for a rational interpretation of an ambiguous document, contrary to *Pape*. They allow a public figure to recover for a report of a judicial proceeding in which she was involved even though there was no "actual malice", contrary to *New York Times, Butts, Gertz* and *Cox Broadcasting*. They impose liability without proof of actual damage and for material not damaging to reputation in the absence of "actual malice", contrary to *Hill* and *Gertz*.

These propositions and their application to the resolution of the questions presented in this case can best be considered against a background of certain factual conclusions appearing from the record and legal principles established by this Court which must be either undisputed or not subject to serious dispute.

On the factual side there are five such conclusions, as follows:

(1) There is no basis upon which the TIME Milestones item can be found to have been in error—at the very least, the item was a rational interpretation of an ambiguous document.

(2) Even if error be assumed, there is no basis upon which the error can be found to have been careless.

(3) Respondent was a public figure at the time the item was published.

(4) Even if error be assumed, there is no basis upon which the error can be found to have been made with "actual malice"—*i.e.*, with knowledge of falsity or serious doubts as to truth.

(5) There is no basis for a claim for damage to reputation for that claim was expressly withdawn.

On the legal side, it should be noted initially that the TIME Milestones item is entitled to constitutional protection

since it is editorial material and not commercial material even though the magazine is published for profit (*New York Times, Hill, Gertz*) and, under that constitutional shield, false defamation does not suffice to pierce the shield for there must also be knowledge of falsity, serious doubts as to truth or careless error (*New York Times, Garrison, Hill, Greenbelt, St. Amant, Gertz*). There remain six areas of legal principles established by this Court which prohibit imposing liability for the editorial material involved in this case as follows:

(1) A truthful report of a judicial decision (*Cox Broadcasting*).

(2) False defamation of a private figure absent careless error (*Gertz*).

(3) A rational interpretation of an ambiguous document (*Pape*).

(4) Erroneous report of a judicial decision absent knowledge of falsity or serious doubts as to truth (*New York Times, Cox Broadcasting*).

(5) False defamation of a public figure absent knowledge of falsity or serious doubts as to truth (*Butts, Gertz*).

(6) False material not damaging to reputation absent knowledge of falsity or serious doubts as to truth (*Hill, Gertz*).

The four questions presented in this case tie in with these five established facts and six established legal principles, as follows:

(1) Liability without fault—facts 1 and 2 and legal principles 1 and 2, *i.e.*, a truthful report of a judicial decision without careless error.

(2) Rational interpretation—fact 1 and legal principle 3, *i.e.,* a rational interpretation of an ambiguous judicial decision.

(3) Imposition of an "actual malice" test to defamation—facts 3 and 4 and legal principles 4 and 5, *i.e.,* the item a report of a judicial decision and respondent a public figure and no knowledge of falsity or serious doubts as to truth.

(4) Imposition of an "actual malice" test to false material not damaging to reputation—fact 5 and legal principle 6, *i.e.,* no damage to reputation and no knowledge of falsity or serious doubts as to truth.

Our argument which follows is founded upon the facts and principles thus outlined and this introduction thus gives the Court a convenient summary and capsule of that argument.

ARGUMENT

I.

THE SUPREME COURT OF FLORIDA HAS IMPOSED LIABILITY WITHOUT FAULT CONTRARY TO *COX BROADCASTING* AND *GERTZ* AND THUS CONTRARY TO THE FIRST AMENDMENT.

This Court's constitutional decisions—beginning with *New York Times* and extending through *Cox Broadcasting*—make clear that the First Amendment precludes imposing liability without fault, particularly when the publication reports "true information" which is "disclosed in public court documents". The news item in this case is clearly entitled to First Amendment protection, whether that protection be the "truthful" test of *Cox Broadcasting,* the strin-

gent "actual malice" test of *New York Times* and *Butts,* or the more limited shield provided by *Gertz.* But whatever the applicable test, the Supreme Court of Florida has exceeded constitutional bounds in imposing liability without fault. Moreover, it has done so solely on the basis of its claim that petitioner erred in reporting that respondent was divorced on the ground of adultery—a claim which lacks substance because the news item, despite the subsequent rationalization of the Florida Supreme Court, stated precisely that which the divorce decision that it reported had held.

a. *Petitioner truthfully reported a judicial decision.*

Subsequent to the decisions below, this Court held in *Cox Broadcasting* (95 Sup. Ct. p. 1047) that the public interest in having reports of judicial proceedings "will not allow exposing the press to liability for truthfully publishing information released to the public in official court records" and that "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. See *Miami Herald Publishing Co.* v. *Tornillo, supra* at 258." (Footnote omitted.)

That is what petitioner did here. Based on the news items and dispatches before its editorial personnel, petitioner truthfully published what the Firestone divorce decree disclosed—that Russell Firestone's "counterclaim for divorce on grounds of extreme cruelty and adultery" had been "granted", and that respondent was accordingly divorced "on grounds of extreme cruelty and adultery". As the District Court of Appeal specifically found in holding for petitioner after the first reversal by the Florida Supreme Court, the "publication fairly and accurately

reported the final judgment [in the divorce proceeding]". 279 So. 2d at 394, A. 620.

Petitioner accordingly cannot be held liable for its report of the Firestone divorce. That report was accurate and truthful when it was made and is accordingly constitutionally protected under *Cox Broadcasting*.* No amount of after the fact explanation by the Florida Supreme Court of what the divorce decree meant or should have meant can deprive petitioner of that constitutional protection, particularly since, as we will now show, that would impose liability without fault contrary to the repeated holdings of this Court.

b. *There was no error, fault or negligence on the part of petitioner.*

Gertz holds (pp. 347-48) that "liability without fault" cannot be imposed in any defamation action instituted against a member of the "press". But that is just what the Florida Supreme Court has done here.

The editorial process presented to the trial court and to the Supreme Court of Florida, was clearly proper editorial procedure with respect to a newsworthy item reporting on a judicial decision of considerable public interest. Testimony by Researcher Nadasdy, Writer Doerner and Editor Daniels made that quite clear (A. 217-40, 257, 260-61, 266-67, 279-84, 292-95, 298-99, 302-09, 317-21, 323-29, 333-40). The item was written, edited and checked, based upon an AP dispatch and a New York Daily News clipping plus two specific written dispatches from Florida (A. 221-22, 224, 229-30, 232-34, 261, 279, 282, 284, 311, 318, 321, 325-29, 334-37). Those four documents gave precisely the same picture as does the opinion of the trial court in the

*Totally aside from the rightness or wrongness of petitioner's report, it was an interpretation. Compare *Gertz*, p. 339, "Under the First Amendment there is no such thing as a false idea."

Firestone divorce case itself, namely, that the divorce was founded both on extreme cruelty and adultery. There is thus no possible negligence, whether with "convincing clarity" or not and, again, no error. That lack of error is also significant in the fact that no retraction was given, a fact repeatedly stressed in argument in the trial court (A. 89, 139-40, 273, 286-87, 474, 476, 481-83, 507) and stressed by the Florida Supreme Court in both of its opinions in this action (271 So. 2d at 753-54, A. 609-10; 305 So. 2d at 174-75, A. 622-23). How can one retract that which is true? And how does that lack of retraction possibly make any difference whatsoever with respect to a constitutional defense either of lack of negligence or of lack of "actual malice", each of which must be judged by facts prior to publication and not that which took place after publication. The Florida Supreme Court seemed to be oblivious of this obvious fact.

There is simply no basis, on the facts of this case, for finding that petitioner was negligent or otherwise at fault. As the District Court of Appeal said in its opinion (254 So. 2d 389-90, A. 592-93):

> "Time testified as to the elaborate procedures undertaken to insure the accuracy of its article. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth.
>
> * * *
>
> "It is, therefore, our conclusion as a matter of fact and law that Time was guilty of no malice, that it took the precautions reasonably required under the circumstances. If the press were charged with correctly analyzing the legal intricacies of each

news item, their pages would remain empty of substance. All we can expect is an honest, careful attempt at truth and accuracy. We received it."

Yet the Florida Supreme Court disposed of those categorical findings in a single paragraph of its last opinion, as follows (305 So. 2d at 178, A. 630):

> "Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz* v. *Welch, Inc.*, supra. Pursuant to Florida law in effect at the time of the divorce judgment (Section 61.08, Florida Statutes), a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of 'journalistic negligence.'"

The Supreme Court of Florida thus found negligence based *solely* on its view that the TIME Milestones item was in error.* In so doing, it clearly departed from the rule running through all constitutional First Amendment cases

*The jury at the trial of this libel action never passed on the question of petitioner's fault, other than to refuse to award punitive damages and thus endorse petitioner's good faith, for the only issue given to the jury was that of truth (A. 508). Even the issue of qualified privilege to report judicial proceedings was given to the jury on the basis that the report must be accurate (A. 509).

commencing with *New York Times* that liability cannot be predicated solely on error. *New York Times,* p. 273, *Garrison,* pp. 73, 75, 78, *Hill,* pp. 387-88, *Greenbelt,* p. 10, *Gertz,* pp. 340-41.

And even that claim of error is erroneous, since there was no error. The Supreme Court of Florida seemed unable to grasp the elementary principle that the trial court in the Firestone divorce action did what it was not supposed to do, *i.e.,* it found adultery and also awarded alimony. But the fact that it was not supposed to do that cannot possibly prove that it did not do that, because that was precisely what it did. The fact that the Florida Supreme Court, some five years later, in its final decision with respect to the Firestone divorce case (263 So. 2d 223), upheld the "extreme cruelty" ground of the divorce award (p. 225), which made unnecessary investigation of the "adultery" ground of the divorce award, and gratuitously added that the trial court "did not find the wife guilty of adultery" (p. 225), cannot change what the divorce court did. That court, faced with a counterclaim for divorce by the husband founded both on "extreme cruelty and adultery", simply stated that "defendant's counterclaim for divorce be and the same is hereby granted"—which can only mean, in plain English, that it found for the husband on both adultery and extreme cruelty. Unless the plain meaning of the English language is to be completely disregarded in the Florida courts, the Florida trial court plainly did what the TIME item said it did, and the gratuitous remark five years later in the Florida Supreme Court opinion in the divorce case regarding the basis of the decision can no more change that than it can change black to white. Nor can it afford any basis for denying First Amendment protection to petitioner.

In arguing that the Supreme Court of Florida did not impose liability without fault, respondent erroneously relies

on a supposed conflict between Delaney, petitioner's Palm Beach "stringer", and Farish, attorney for respondent, with respect to the statement in Delaney's dispatch of December 16, 1967 (Pl. Ex. 4, A. 101, 532), that the "technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery". Respondent also impliedly tries to create a conflict between Delaney and Judge Knott, who rendered the divorce decision, by pointing to Judge Knott's testimony that he did not tell Delaney that respondent was guilty of adultery, thus inferring that Delaney had testified that Judge Knott had told him that respondent was guilty of adultery.

To begin with, there is no conflict between Farish and Delaney. Farish testified explicitly that "I said Mr. Firestone had accused her of extreme cruelty and adultery" (A. 135) and agreed that he and Delaney had discussed that "the technical grounds for divorce as alleged in the complaint were adultery and extreme cruelty" (A. 147). Once this testimony is placed in context with the clear language of the opinion and judgment which was being reported ("defendant's counterclaim for divorce be and the same is hereby granted"—Pl. Ex. 2, A. 96, 528) the inescapable conclusion is that the grounds upon which the divorce was granted were extreme cruelty and adultery. No amount of argument can gainsay that fact, particularly when the opinion specifically noted, as reported in Duncan's (Miami bureau head) first dispatch (Def. Ex. 2, A. 230, 544), that the "extra marital escapades of the plaintiff" sufficed to "have made Dr. Freud's hair curl". There is no conflict.

Nor was there conflict between Judge Knott and Delaney for Delaney most certainly did not testify that Judge Knott told him respondent was guilty of adultery. He did testify that the subject was not mentioned with Judge

Knott (A. 359). He further testified that his dispatch (Pl. Ex. 4, A. 101, 532) was sent based on a conversation with Farish (A. 356, 363, 367-69) at a time when he could not reach Judge Knott (A. 357-58, 369) and that there was nothing in his conversation with Judge Knott, which occurred after the dispatch was sent, which was inconsistent with that dispatch (A. 370). He also testified that Judge Knott merely read portions of the opinion to him (A. 359, 370). There is no conflict.

Even if there were conflict, petitioner was not negligent or at fault. Delaney's knowledge is not pertinent to the constitutional inquiry. Precisely the same state of facts with respect to the knowledge of a reporter was presented to this Court in *Walker* in which the Associated Press relied on its reporter in the field. In dismissing that action, despite the fact that the reporter's testimony differed from that given by plaintiff Walker so that if the reporter's knowledge were relevant there was created an issue of fact sufficient to bar judgment for defendant, this Court disregarded the reporter's knowledge and stated (388 U. S. at 158):

> " . . . The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. . . ."

To the same effect, see *Walker* v. *Pulitzer Pub. Co.*, 394 F. 2d 800, 805 (8th Cir. 1968), and *Firestone* v. *Time, Inc.*, 460 F. 2d 712, 721 (5th Cir. 1972), *cert. denied*, 409 U. S. 875.*

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*The Fifth Circuit *Firestone* case was a prior action brought by Mary Alice Firestone with respect to a Life article, also published by petitioner. There, however, the Fifth Circuit, unlike the Florida Supreme Court, protected petitioner's First Amendment rights so that there was no need for action by this Court, and this Court accordingly denied respondent's petition for certiorari.

This Court's recent decision in *Cantrell* v. *Forest City Publishing Co.*, 419 U. S. 245, further shows the fallacy of respondent's contention. There this Court held that the knowledge of the staff writer, Eszterhas, was the knowledge of his employer Forest City Publishing Company (419 U. S. p. 253-54) just as, of course, the knowledge of the New York editorial staff of petitioner would be implied to petitioner, for researcher Nadasdy, writer Doerner and editor Daniels were the persons "responsible for publication" (*New York Times,* p. 287). By the same token, this Court in *Cantrell* dismissed the action against photographer Conway on the ground that he "was not shown to have participated" in the editorial process (419 U. S. p. 253 n. 5). Delaney is in the same posture. Since he did not participate in writing or editing the TIME item, his knowledge will not be implied to petitioner and is immaterial to the constitutional inquiry.

In this case, the ample precautions taken by petitioner in publishing the Milestones item clearly negate any finding of "actual malice". These exhaustive precautions also clearly constitute compliance with the standard of "reasonable conduct in the light of the apparent risk"* and thus preclude any finding of negligence.

The burden is, of course, on respondent to prove that petitioner was at least negligent in the sense of the constitutional standard mandated by *Gertz*. (This point need never be reached if petitioner's "public figure", "report of judicial proceedings", and other arguments are accepted.) If this were an ordinary negligence case, respondent would have to carry that burden by a preponderance of the evidence—*see, e.g., Prosser on Torts* 208-09 (4th ed. 1971). But because First Amendment rights are involved here, respondent has the burden of showing negligence with

**Prosser on Torts* 324 (4th ed. 1971).

"convincing clarity". That is the burden which public officials or public figures must carry to prove the "actual malice" required by the *New York Times* rule; not only must they prove "actual malice", but they must do so with "the convincing clarity which the constitutional standard demands. . . ." 376 U. S. at 285-86. The requirement of negligence which *Gertz* applies to private defamation plaintiffs, although "less demanding" than the "actual malice" requirement of *New York Times,* is also a constitutional standard and private plaintiffs must accordingly prove negligence with "convincing clarity".

Respondent cannot show that petitioner was negligent here under any standard of proof, let alone by proof of "convincing clarity". The fact remains that liability without fault was imposed on petitioner, contrary to the command of the First Amendment.

II.

PETITIONER'S NEWS ITEM WAS A RATIONAL INTERPRETATION OF AN AMBIGUOUS DOCUMENT UNDER *PAPE* AND THUS ENTITLED TO FIRST AMENDMENT PROTECTION.

The holdings of the Florida Supreme Court are incompatible with this Court's opinion in *Time, Inc.* v. *Pape,* for a "rational interpretation of an ambiguous document" can no more be the basis for a finding of fault than it can be for a finding of "actual malice". The District Court of Appeal dealt with this matter in its opinion as follows (254 So. 2d 390, A. 592-93):

> "The wording of the divorce decree was ambiguous. At least two reasonable interpretations were available—that plaintiff was found an adulteress

as charged in the complaint, or that she was not an adulteress because of the incongruity of such a finding with an award of alimony.

"The testimony at trial, some deemed too spicy for public sessions, implicated both parties in compromises to marital fidelity. The wording of the divorce decree itself would lead a reasonable person to conclude adultery had been committed, '[a]ccording to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr.' Part of this language was reproduced exactly in Time's article.

"In addition to Time's rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to substantiate information. Plaintiff's attorney and the judge were called for verification."

In writing the report in this case, the TIME personnel had before them an AP dispatch which directly quoted from the language of the final decree describing the plaintiff's "extramarital escapades" (Def. Ex. 1, A. 99, 543). The same language was quoted in a second dispatch (Def. Ex. 2, A. 230, 544) and in a newspaper report (Def. Ex. 3, A. 406, 545) which they had. Adultery is specifically mentioned no less than three times in the dispatches and newspaper stories they had before them (Pl. Ex. 4, A. 101, 532; Def. Ex. 1, A. 99, 543; Def. Ex. 3, A. 406, 545). And one

dispatch asserted "as fact" that adultery was a ground for the divorce (Pl. Ex. 4, A. 101, 532).

The article involved in the *Pape* case reported on a Civil Rights Commission report in the identical way that the article involved in this case reported on a Florida Circuit Court decision, *i.e.*, the Firestone divorce. In each instance it was necessary that the article interpret that which was being reported on—and in each instance the article was a "rational interpretation" (*Pape*, p. 230). In *Pape* the rational interpretation was to leave out the word "alleged". Here, the rational interpretation was to state—not that respondent had been accused of adultery, which she had—but that she had been divorced on the ground of adultery, since the decree granted the husband's counterclaim charging her with adultery. Petitioner was right in so reporting, but the Constitution does not require petitioner to be right. A rational interpretation is all that is required, and petitioner clearly met that requirement.

III.

PETITIONER'S NEWS ITEM WAS A REPORT OF A JUDICIAL DECISION UNDER *COX BROADCASTING* AND RESPONDENT WAS A PUBLIC FIGURE UNDER *GERTZ* AND ON EITHER GROUND AN "ACTUAL MALICE" TEST SHOULD HAVE BEEN APPLIED AND THE ACTION DISMISSED ON FIRST AMENDMENT GROUNDS.

The facts of this case preclude any finding that the publication was made with "actual malice"—*i.e.*, that petitioner published with knowledge that the article was false or with serious doubts of its truth. Even the Supreme Court of Florida went no further than to say that petitioner was negligent, and that conclusion was erroneous as shown in Point I, *supra*. Since the "actual malice" test should have been applied here, because the article was a report of a

judicial proceeding and because respondent was a public figure (at least for the purpose of that proceeding), the decisions of the Florida Supreme Court must be reversed.

a. *The "actual malice" test should apply to reports of judicial proceedings.*

The holdings of the Florida Supreme Court will make it impossible for the press to report judicial decisions, particularly in any current and meaningful way. This Court has long emphasized the important function performed by the press in informing the public of court proceedings and the maximum freedom and special protection which must be given to the press in carrying out that function. *See, e.g., Craig* v. *Harney,* 331 U. S. 367, 374 (1947); *In re Oliver,* 333 U. S. 257, 268 (1948); *Estes* v. *Texas,* 381 U. S. 532, 539, 541-42 (1965); *Sheppard* v. *Maxwell,* 384 U. S. 333, 350 (1966). This line of decisions was recently capped by *Cox Broadcasting,* holding that the press cannot be sanctioned for "truthfully publishing information" released in official court records, or for publishing "true information" disclosed in public court documents. As pointed out in Point I.a., *supra,* petitioner is entitled to reversal for that reason alone. However, even if petitioner erred or was otherwise at fault, which it was not, petitioner still should not be liable because the public interest in having reports of judicial proceedings requires application of the "actual malice" test. If the holdings of the Florida Supreme Court are sustained, the press will not be able to serve that public interest.

The Supreme Court of Florida has apparently decreed that a publisher cannot safely report a court decision unless he satisfies all of the following requirements—

> —A copy of the decision must be obtained before publication. It is not enough to publish on the basis of descriptions of the decision.

> —The decision must be carefully analyzed for inconsistent statements and legal rationale. It is not enough to report what a court said it did. A publisher must report what the court *should* have said it did.
>
> —A publisher must anticipate what a reviewing court, long after the event (five years here), will say a lower court held or should have held.

These requirements are not only absurd—if petitioner had had a copy of the Firestone divorce decision when its Milestones item was written, the item would have been exactly the same, for that opinion expressly granted the husband's counterclaim and stated that the counterclaim was for "extreme cruelty and adultery", and those facts cannot be changed. More importantly those requirements frustrate the public's right to have current and meaningful reporting of judicial decisions. A publisher would be at risk even if he simply printed the full text of the decision. And there would be inordinate delay.*

Such a stultifying result cannot be squared with the First Amendment and the cited decisions of this Court emphasizing the public's right to be informed of judicial proceedings. Published reports of judicial proceedings, like discussions of public officials and public figures, cannot

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*If petitioner had printed the full text of the divorce court's opinion, instead of its Milestones summary, it would still be liable under the rationale of the Florida Supreme Court. For that decision conveyed to the public exactly what petitioner reported—that respondent had been divorced on grounds of extreme cruelty and adultery.

Delay is also inevitable. In many instances it will be some time before the exact decision can be obtained. Further delay would result from the need to flyspeck the decision for error. Even in the case of decisions of this Court, such requirements would substantially delay reporting—decisions rendered on a Monday, which are now routinely reported throughout the country on Monday evening or Tuesday morning, could not possibly be reported upon until the end of the week. And even then a publisher would be liable if he printed a decisional error defaming someone.

give rise to liability for defamation unless the defamatory statements are made with "actual malice" in the *New York Times* sense. The First Amendment values which protect discussion of public officials apply with equal force to discussion of judicial proceedings.

The solicitude shown by this Court with respect to reports of judicial proceedings emphasizes the importance of maintaining an unrestricted flow of information about judicial proceedings to the public. In *Estes* v. *Texas,* 381 U. S. at 539, this Court recognized:

> "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences including court proceedings."

And in *Sheppard* v. *Maxwell,* 384 U. S. at 350. this Court reiterated:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.' *Craig* v. *Harney,* 331 U. S. 367, 374 (1947)."

This solicitude cannot be surprising in our system of government where the courts are a coequal branch and the common law as expressed in judicial decisions regulates many facets of society's relationships.

The common law early recognized that actions for defamation based on reports of the activities of the courts had a chilling effect on the obligation of the press to report to the public. The response was the recognition of a privilege. In *King* v. *Wright,* 101 English Reports 1396, 1399 (Kings Bench 1799), Justice Wright explained:

> "The proceedings of Courts of Justice are daily published, some of which highly reflect on individuals. . . . Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the Courts; but they are printed for the information of the public. . . . Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."

The common law privilege to report on judicial proceedings was limited to reports which were fair and accurate. However, the same factors which weigh in favor of the strategic protection accorded the press for defamatory falsehoods concerning public officials and public figures are present in reports of judicial proceedings regardless of whether the report involves public officials, public figures or individuals who might otherwise not be considered pub-

lic figures.* The overriding public interest in the free flow of information on the workings of the judiciary demands the same "breathing space" given publications concerning public officials. The risk of self-censorship and timidity naturally arising from the spectre of punishment of error in reports of judicial proceedings must tip the scales in favor of limiting the maintenance of defamation actions to those situations in which there is knowledge of falsity or serious doubts as to truth. Indeed, the opinion in *New York Times* itself strongly suggests that reports of judicial proceedings should enjoy the protection of the "actual malice" standard. 376 U. S. at 272-73. And Dean Prosser has concluded that the *New York Times* rule applies to the privilege for reporting judicial proceedings, noting that "it seems beyond dispute that even if the report is an inaccurate one, it is privileged unless it is made with knowledge of the falsity or in reckless disregard of its truth." *Prosser on Torts* 832 (4th ed. 1971).

The fact of the matter is that, with a report of judicial proceedings, the standard must be "actual malice". Indeed, this was suggested by Mr. Justice White in his concurring opinion in *Metromedia* (403 U. S. at 61, 62):

> " . . . Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place. . . .
>
> * * *
>
> "I would accordingly hold that in defamation actions, absent actual malice as defined in *New York*

*It is difficult to conceive that an individual who is a party to a judicial proceeding is not a "public figure" under the tests of *Butts* and *Gertz*, at least for the purpose of reports of that proceeding.

> *Times Co.* v. *Sullivan*, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view."

That doctrine has now been implicitly approved, we submit, by this Court in *Cox Broadcasting*.

b. *The "actual malice" test applies because respondent was a public figure.*

Additionally, the result below cannot be squared with this Court's decisions in *Butts* and *Gertz* that public figures must prove "actual malice" to recover for defamation. Under all relevant tests, respondent was a "public figure". Indeed, the Milestones section in TIME magazine is limited to "important events in the lives of important people" as testified by writer Doerner at the trial (A. 318). Respondent was "drawn into a particular public controversy" (*Gertz*, p. 351), indeed she initiated it, and "commanded a substantial amount of independent public interest" (*Butts*, p. 154).

It is likely that the facts, recited by the Supreme Court of Florida in its first opinion (271 So. 2d at 751, A. 605), that:

> "[P]etitioner and her ex-husband were well known. They were prominent among the '400' of Palm Beach society, and were also active members of the sporting set,"

are sufficient to make respondent an individual of "such pervasive fame or notoriety" that she has "become a public

figure for all purposes and in all contexts." (*Gertz*, p. 351) However, such a broad finding is not required since it is absolutely clear that respondent was a public figure under any relevant test with respect to reports of the divorce. Therefore, we adhere to this Court's admonition in *Gertz* (p. 352):

> "It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

After referring to the general prominence of the Firestones, the Supreme Court of Florida continued its discussion of the facts showing respondent's public figure status thusly (271 So. 2d at 751, A. 605-06):

> "Sadly, however, their marital difficulties were equally well known; and the charges and countercharges of meretriciousness, flowing from both sides of the controversy, made their divorce action a veritable *cause celebre* in social circles across the country. Additionally, as the District Court observed:
>
> 'The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
>
> 'The Associated Press flashed news of the decree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . .'

> Finally, on the point of notoriety, it appears that petitioner granted several interviews to news media during the divorce action and allowed herself to be quoted in relation thereto."

The Supreme Court of Florida's characterization of the Firestone divorce trial as a *cause celebre* is well documented in the record. Even a cursory examination of the news clippings attached as exhibits to the Bueno and Wilson affidavits (A. 37-76) shows that the divorce proceedings received daily publicity. Under any rational definition, the Firestone divorce was a public controversy about which the press had a duty to report, and respondent was a public figure in that context. Notwithstanding this obvious fact and the findings of the District Court of Appeal, the Supreme Court of Florida, although noting that the Firestones were prominent and their divorce proceeding was newsworthy and had received widespread publicity, held that reports of the Firestone divorce "were not constitutionally protected as being matters of *real* public or general concern" (271 So. 2d at 752, A. 608, italics added). This holding is not only erroneous but displays the same proclivity of the Florida Supreme Court to usurp the editor's function which this Court condemned in *Tornillo*. Public controversies involving public figures are not limited to government operations. *See* the concurring opinion of Chief Justice Warren in *Butts* (pp. 163-64) which a majority joined. As the Court stated in *Hill* (p. 388):

> "The guarantees for speech and press are not the preserve of political expression or comment on public affairs, essential as those are to healthy government. . . . 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information

> is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill* v. *Alabama,* 310 U. S. 88, 102."

Respondent was a central figure in a public controversy. Therefore, she clearly comes within the ambit of one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure". (*Gertz,* p. 351).

When the public controversy is a judicial proceeding, the concurrence of the interests underlying the protection required for reports of judicial proceedings and public figures commands that the "actual malice" test be applied. Such an approach is consistent with the rationale of *Gertz* which eschewed distinctions based on types of speech in favor of distinctions based on the status of the person defamed. Both interests are served by a determination that a party to a judicial proceeding is a public figure for the purposes of reporting that proceeding. For a plaintiff like respondent, the bringing of a lawsuit involves, in some measure, the decision to put one's disputes before a public tribunal and thereby forego a degree of anonymity, the principal "normative consideration" justifying different treatment for public and private individuals. And defendants in lawsuits are likewise individuals "drawn into a particular public controversy". Whether a defendant has become a public figure "voluntarily" depends on the definition of purposeful activity. Certainly a person who commits a crime has engaged in purposeful activity, although it is unlikely that he would consider himself a voluntary participant in a criminal trial. See *McFarland* v. *Hearst Corp.,* 332 F. Supp. 746 (D. Md. 1971), holding that the plaintiff, in a libel action, by committing a crime had made himself a public figure. And in *Edmiston* v. *Time, Inc.,* 257 F. Supp. 22 (S. D. N. Y. 1966), the

plaintiff had brought an action alleging that reports of a rape prosecution in which she had been the complaining witness were false. In sustaining the defendant's assertion that the publication was protected by the common law privilege for reports of judicial proceedings the court stated (pp. 26-27):

> "Thus, persons such as plaintiff who become associated, even unwittingly, with crime or other interesting events become in effect public figures at least for the time. . . ."

Respondent is thus plainly a public figure by reason of being plaintiff in the Firestone divorce. She is also to be classed as a public figure because of her relationship to Russell Firestone. The class of public figures has been defined to include "artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done". *Cepeda* v. *Cowles Magazines and Broadcasting, Inc.,* 392 F. 2d 417, 419 (9th Cir. 1968), *cert. denied,* 393 U. S. 840. Beyond any possible doubt Russell Firestone fits that definition. When respondent became embroiled in a public controversy because of her relationship to Russell Firestone she became a public figure. This obvious point was made recently in *Meeropol* v. *Nizer,* 381 F. Supp. 29 (S. D. N. Y. 1974). *Meeropol* was an action for defamation and invasion of privacy brought by the sons of Ethel and Julius Rosenberg and arose from the publication of an account of the Rosenberg-Sobell espionage trial. The plaintiffs sought to take advantage of the change in constitutional focus made by *Gertz.* But the court rejected their arguments holding (p. 34):

> "The teaching of *Gertz,* nonetheless, avails plaintiffs little; its applicability to the present case

is severely limited. Under the tests enunciated in *Curtis* and *Gertz,* plaintiffs surely must be classed as public figures. Beyond any doubt, they have 'assumed roles of especial prominence in the affairs of society' and 'they invite attention and comment'. *Gertz, supra,* 418 U. S. at 345, 94 S. Ct. at 3009.

"As children of the Rosenbergs, the plaintiffs spent much of their early years in the public spotlight. The activities of their parents were monitored by book, magazine and newspaper throughout the world. As children of famous parents, they achieved 'general fame or notoriety in the community'."

Respondent argues that the public figure issue is being now raised for the first time. There are two dispositive answers to this erroneous argument:

First, it is completely contrary to the record. Petitioner argued public figure throughout, from the trial court to the second decision of the Florida Supreme Court.*

Second, it is immaterial whether petitioner argued public figure below. The Federal question under the First and Fourteenth Amendments having been properly raised below, petitioner may urge and this Court may consider any arguments upon the Federal question, for, as said in *Dewey* v. *Des Moines,* 173 U. S. 193, 198, "[p]arties are not confined here to the same arguments which were advanced in the [state] courts below upon a Federal question there discussed."

*The point was consistently presented, *inter alia,* in petitioner's answer (A. 11), its pre-trial statement (A. 30), its requests for instructions (A. 557), its motions for directed verdict and new trial (A. 409, 546, 566, 569), its briefs on appeal, and its supplemental brief, submitted to the Florida Supreme Court on the second appeal, following the decision of this Court in *Gertz.* Petitioner also submitted proof as to public figure in the form of affidavits showing the extensive prior publications regarding respondent in the *Miami Herald, Palm Beach Post* and *Palm Beach Times* (A. 37-76). The public figure matter was also discussed in the 1971 decision of the District Court of Appeal (254 So. 2d at 389, A. 91) and in the first decision of the Florida Supreme Court (271 So. 2d at 751, A. 605).

IV.

ANY CLAIM FOR DAMAGE TO REPUTATION HAVING BEEN WITHDRAWN, THIS CASE IS GOVERNED BY *HILL* AND *GERTZ* SO THAT AN "ACTUAL MALICE" TEST SHOULD HAVE BEEN APPLIED AND THE ACTION DISMISSED ON FIRST AMENDMENT GROUNDS.

The withdrawal of respondent's claim for damage to reputation requires the imposition of an "actual malice" standard for three reasons. First, in permitting the states to condition liability on a lesser degree of fault than "actual malice", this Court held in *Gertz* that absent proof of "actual malice", only actual damages could be recovered. Respondent could not (and did not) prove such damages. Second, since the rule of the *Gertz* case is based on balancing of interests, removal of the states' prime interest—compensating damage to reputation—requires a readjustment in favor of a more "demanding" standard of proof. Third, by seeking damages solely for mental pain and anguish unrelated to damage to reputation, respondent in effect changed her cause of action to one for "false light" invasion of privacy, the same as the plaintiff in *Hill,* and must meet the same standard of proof.

That the interest which clashes with the First Amendment's guaranty of a free press in a defamation action is protection of reputation is the thread which runs throughout this Court's opinions since *New York Times. See Gar-*

rison, p. 73; *Rosenblatt,* p. 86; *Hill,* p. 391; *Butts,* p. 135; *Monitor Patriot,* pp. 270-76; *Pape,* p. 284; *Metromedia,* pp. 48-49; *Gertz,* pp. 343, 347-49. Most recently in *Cox Broadcasting* this Court reiterated that "in defamation actions * * * the protected interest is personal reputation . . ." (95 Sup. Ct. p. 1043). Accordingly, in making proof of actual damages a constitutional prerequisite for recovery in a defamation action, the Court in *Gertz* was concerned with damage to reputation. Without proof of damage to reputation, there is no cognizable actual damage for which to compensate a defamation plaintiff. Thus, in distinguishing their proposed right of privacy from libel and slander Warren and Brandeis note:

> ". . . The principle on which the law of defamation rests, covers . . . a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellowmen,—the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action." 4 Harv. L. Rev. 193, 197 (1890).

Plaintiff has argued (Br. Opp., pp. 18-19) that Mr. Justice Powell included mental suffering among the items of actual damage listed in *Gertz.* But that mental suffering, as recognized by Warren and Brandeis, is that which flows from

injury to reputation. Without that predicate there can be no proof of actual damages and, therefore, no recovery in the absence of proof of "actual malice".

In *Gertz,* this Court struck a balance between competing interests. On one side of the scale stood the freedom of the press guaranteed by the First Amendment. On the other weighed the states' concern with compensation for damage to reputation. With respect to private individuals the balance reached equilibrium at a point where liability for defamation may not be imposed on the press without fault. But just as the removal of a lead weight from one side of a balance will cause the other side to fall, respondent's withdrawal of a claim for damage to reputation must tip the scale in favor of a more "demanding" standard of proof. In short, even assuming (erroneously as we have shown above) that there are cognizable damages in a defamation action without loss of reputation, eliminating the chief component requires imposition of an "actual malice" standard.

The "actual malice" standard also applies under the *Hill* decision since, having withdrawn any claim for damages to reputation, respondent is in essentially the same position as the plaintiff in *Hill,* which necessitates the same test. As the Warren and Brandeis article pointed out, a claim for mental anguish unrelated to damage to reputation is basically a claim for invasion of privacy. Plaintiff Hill's action sought damages for an alleged falsehood which did not injure reputation. Thus, respondent here must meet the same standard of proof.

Since there was and can be no showing of "actual malice", the holdings below must be reversed.

CONCLUSION

If the constitutional guaranty of a free press is to mean anything as against a State Supreme Court which pays lip service to but ignores the decisions of this Court, this case must be reversed.

For the foregoing reasons, the order of the Supreme Court of Florida of December 11, 1974 (305 So. 2d at 178, A. 630-31), should be reversed and this case remanded to that Court with directions that the orders of the District Court of Appeal of Florida, Fourth District, of October 28, 1971, and June 20, 1973, be reinstated, and entry of judgment in favor of petitioner be directed.

May 27, 1975.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-944

TIME, INC.,

Petitioner,

versus

MARY ALICE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On December 15, 1967, Russell A. Firestone, Jr., was granted a divorce from Mary Alice Firestone. Mrs. Firestone had originally sought separate maintenance, but her husband counterclaimed "for divorce on grounds of extreme cruelty and adultery." In awarding the divorce to Russell Firestone, the divorce decree stated (Pl. Ex.2, A.525):

> ". . . It is the conclusion and the finding of the Court that neither party is domesticated. . . . In

> the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved. . . ."

The divorce decree also awarded alimony in the sum of $3,000.00 per month to Mrs. Firestone, plus custody of their minor child, and $740.00 per month child support (Pl. Ex.2, A.528).

Defendant Time, Inc., the publisher of the magazine "Time," printed on December 22, 1967, under the heading "Milestones" the following article:

> "Divorced. By Russell A. Firestone, Jr., 41 heir to the tire fortune; Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach school teacher; *on grounds of extreme cruelty and adultery;* after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, to 'make Dr. Freud's hair curl'." (emphasis added) (Pl. Ex.1, A.522)

Thereafter on January 19, 1968, Mrs. Firestone, through her attorney, demanded in writing a retraction of said article (A.139-141; Pl. Ex.11&12, A.539-542). Since Mrs. Firestone had been awarded alimony, she had not been found guilty of, nor had the divorce been granted on the ground of adultery (as stated in Time's article) for under the laws of Florida a wife found guilty of adultery could not be awarded alimony. §61.08 F.S. Notwithstanding, Time, Inc. declined to retract the article.

Mrs. Firestone then filed a libel suit against Time, Inc.

which defended asserting, among other things, the absence of actual malice. This cause came on for trial on July 13, 1970. The jury returned a verdict for Mrs. Firestone and against Time, Inc. in the amount of $100,000.00, and a Final Judgment was entered pursuant to the jury verdict on September 9, 1970 (A.575). Various appeals followed.

The facts upon which the jury returned the verdict reflect that Bill Doerner, who had been with Time Magazine approximately six months at the time the article was written, came into the office of Miss Ursula Nadasdy, a legal researcher for Time magazine, and showed to her an Associated Press wire pertaining to the Firestone divorce. The AP dispatch merely stated that Mrs. Firestone was "accused of" adultery (A.218, Def. Ex.1, A.543). Miss Nadasdy immediately called the "library" to obtain all folders pertaining to the Firestone (A.219-220). She promptly sent a query to Time, Inc.'s Miami bureau (A.219-220. Pl. Ex,6,A.534), specifically asking them to report "the grounds on which it (the divorce) was granted in the words of the Judge (A.202-203,215). She explained that the legal grounds for the divorce were necessary and that Time, Inc. would not just take the word of the Associated Press or any other source. It was up to their correspondents to get the exact grounds (A.214-219).

Miss Nadasdy did, in fact, receive precisely what she requested (Def. Ex.2, A.544). In quotation marks, the correspondents for Time, Inc. told the New York office the grounds for the divorce in the words of the Judge:

> "The Judge ruled. 'It is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.' "

The communications between Time's New York office and their Miami branch were rather fast and furious. Because this was a Saturday and the deadline for the publication of this magazine usually was 8:00 p.m., everyone was working against this deadline (A.206-7).

In addition to the AP dispatch and the dispatch from Time, Inc.'s Miami Bureau, neither of which stated Mrs. Firestone had been found guilty of adultery, Miss Nadasdy obtained a clipping of a New York newspaper which likewise stated that Mrs. Firestone had been "accused" of adultery (Def. Ex.3, A.545).

One of Time Inc.'s "stringers", Bob Delaney, was asked to check out the divorce. Neither Delaney nor any other Time employee ever once looked at the court file or read the divorce decree (A.258-9). However, based upon a telephone conversation with Mrs. Firestone's attorney in the divorce proceedings, Mr. Farish, Jr., Mr. Delaney advised Time, Inc. that the grounds for the divorce were extreme cruelty and adultery (Pl. Ex.4, A.101, 532). Mr. Farish, Jr., completely denied that he had ever told Mr. Delaney that. Farish, Jr., testified that Delaney had asked him what Mrs. Firestone was accused of, and Farish, Jr., had stated that Mr. Firestone had accused her of extreme cruelty and adultery. However, he had pointed out to Delaney that the Court had granted the divorce on the ground of lack of domesticity. He advised Delaney that Mrs. Firestone had not been found guilty of adultery (A. 133-137).

Delaney had also contacted Judge Knott, the trial judge who rendered the divorce decree. Judge Knott emphatically testified that he never told Delaney that Mrs. Firestone was found guilty of adultery (A.388-389). On proffer, he also

testified under oath that he did not in fact find Mary Alice Firestone guilty of adultery in his order (A.382).

Once all this information was obtained by Nadasdy, it was turned over to Doerner, the writer. He wrote the first draft of the article, later to be submitted to Mr. George G. Daniels, the Senior Editor, for final approval (Pl. Ex.9, A.537). Doerner admitted that both sources he used to write the first draft of the article mentioned that the presiding Judge doubted the testimony of extramarital affairs (A.321). Doerner had included a statement to that effect in his draft of the article, because he felt that it was important and certainly should be included in the article (A.321-323). However, in the final draft, the Senior Editor Daniels performed surgery on Doerner's work deleting that doubt (A.322) by omitting that statement, and all other references to "accused", "counterclaimed", or "alleged". At trial Doerner admitted that there was nothing that he had before him that had stated that the lower court had ruled that Mrs. Firestone was guilty of adultery (A.329-330). Notwithstanding, the final draft of the article (Pl. Ex.10, A.538) stated that the divorce was granted on the grounds of extreme cruelty and adultery (A.334), failed to mention a word about the Judge discounting much of the testimony as to extramarital activities and failed to mention anything about lack of domesticity, the ground given in the divorce decree as the ground for the divorce.

Finally, it was the duty of Miss Nadasdy to perform an accuracy check and to place over each word a line showing that it had, in fact, been checked and that it was accurate (A.197). She failed to check and mark the word "adultery", although the other words were so marked showing that

they had been checked out and that they were felt to be accurate(Pl. Ex.5, A.533). Mr. Daniels, the Senior Editor, admitted that Time required each word to be so marked and that Miss Nadasdy, the researcher, had failed to meet that requirement(A.299-300). He also admitted that although he had "thought" someone had checked the circuit court file and read the dirorce decree prior to publication (A.258-9), no one had done so.

QUESTIONS PRESENTED

I.

WHETHER THE SUPREME COURT OF FLORIDA IMPOSED LIABILITY WITHOUT FAULT CONTRARY TO COX BROADCASTING AND GERTZ AND THUS CONTRARY TO THE FIRST AMENDMENT?

II.

WHETHER PETITIONER'S NEWS ITEM WAS A A RATIONAL INTERPRETATION OF AN AMBIGUOUS DOCUMENT UNDER PAPE AND THUS ENTITLED TO FIRST AMENDMENT PROTECTION?

III.

WHETHER AN "ACTUAL MALICE" TEST SHOULD HAVE BEEN APPLIED AND THE ACTION DISMISSED ON THE FIRST AMENDMENT GROUNDS?

IV.

WHETHER, UNDER HILL AND GERTZ, WITHDRAWAL OF A CLAIM FOR DAMAGE TO REPUTATION REQUIRES THAT AN "ACTUAL MALICE" TEST BE APPLIED AND THE ACTION DISMISSED ON THE FIRST AMENDMENT GROUNDS?

ARGUMENT

I.

WHETHER THE SUPREME COURT OF FLORIDA IMPOSED LIABILITY WITHOUT FAULT CONTRARY TO COX BROADCASTING AND GERTZ AND THUS CONTRARY TO THE FIRST AMENDMENT?

a. *Whether Time, Inc. truthfully reported a judicial decision.*

Time, Inc. argues that the three dispatches and the newspaper article relied upon by it gave the same picture that their "Milestones" article gave (ie.), that the divorce was granted on the grounds of extreme cruelty and adultery. However, in those documents "accused of adultery" was the exact terminology used. None of those documents stated or implied that Mrs. Firestone was found guilty of adultery.

Alternatively, Time, Inc. argues that it truthfully published what the Firestone divorce decree disclosed. That is, that Firestone's counterclaim for divorce had been granted on grounds of extreme cruelty and adultery. This is clearly incorrect. While Firestone may have counterclaimed for divorce on the grounds of extreme cruelty and adultery, the divorce decree merely stated that Firestone's "counterclaim for divorce" was granted. It did not state upon *what* grounds it was granted. However, it was common knowledge that at that time a wife found guilty of adultery in Florida could not be awarded alimony. Hence, the divorce could only have been granted on the ground of extreme cruelty.

Time, Inc.'s argument that the divorce decree, which

merely stated that Firestone's counterclaim for divorce was granted without specifying the grounds, as a matter of law granted the divorce on all grounds. However, this argument carried to its logical extreme would mean that whenever a claim or counterclaim is granted without specifying upon what grounds, one would as a matter of law be allowed to assume that the claim or counterclaim was granted upon all grounds. However, we know that the most that one is allowed to assume is that the Judge found in favor of the claimant or counterclaimant on *one* of the many grounds alleged.

Time, Inc. also argues that if it had published the full text of the divorce decree, it would still be liable under the rationale of the Florida Supreme Court because the decree would have conveyed to the public exactly what their "Milestones" article did—that Mrs. Firestone had been divorced on the grounds of extreme cruelty and adultery. This clearly overlooks the fact that the jury found exactly to the contrary, finding that the "Milestones" article had a different effect on the mind of the reader than the divorce decree. As stated by the Florida Supreme Court in its second opinion (A.628):

> "We must also emphasize that the trial court specifically instructed the jury that,
>
> > 'I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of Firestone v. Firestone, Case No. 64 C 2790C.'
>
> Therefore, to reach a verdict for petitioner, the jury must necessarily have determined that the article did have a different effect than the reading of the divorce judgment by the public. In McCormick v. Miami Herald Publishing Company, 139 So.2d 197 (Fla.App.2,1962) the court stated that a workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. See also, Hammond v. The Times Publishing Co., 162 So.2d 681 (Fla. App.2,1964). Evidently, the jury determined sub judice that the article in question would have a different effect."

It seems that everyone, including the jury, the judge who authored the divorce decree, and the Florida Supreme Court, in *Firestone v. Firestone* (1972) 263 So.2d 223, and in the decision here appealed, all understood that:

> ". . . the divorce was not granted on grounds of adultery and there was no express finding in the final judgment of divorce that either of the parties was guilty of marital infidelity." (A.622)

It is only Time, Inc. that now finds difficulty with interpretation of a divorce decree that it never read before publishing to the nation that Mrs. Firestone was an adulteress. Time, Inc. did not truthfully report the divorce decree and the jury correctly so found.

b. *Whether there was error, fault or negligence on the part of Time, Inc.*

Time, Inc. argues that the four documents that it used to write its article gave the same picture as the Time, Inc. article, and the same picture as the divorce decree. This picture, argues Time, Inc., is that the divorce was founded both on extreme cruelty and adultery. However,

as shown, *supra*, and under Point II, *infra*, neither the four documents relied upon by Time, Inc. to write the article nor the divorce decree itself (which Time, Inc. never read) stated or implied that Mrs. Firestone was found guilty of adultery.

Time Inc. once again insists that it made no error in interpreting the divorce decree, but that the trial judge did what he was not supposed to do (i.e.), he found Mrs. Firestone guilty of adultery and also awarded her alimony. Such argument belies the evidence. Nowhere in the divorce decree does the judge find Mrs. Firestone guilty of adultery. Certainly one can only make that assumption at his own risk. Nonetheless, Time, Inc. continues to argue that the fact that the husband's counterclaim, which alleged both extreme cruelty and adultery, was granted in language that merely stated "defendant's counterclaim for divorce be and the same is hereby granted" without setting forth the grounds for granting the divorce "can only mean, in plain English, that it found for the husband on both extreme cruelty and adultery". Neither common sense nor legal construction can support such an argument, for the divorce could have been granted on *either* extreme cruelty *or* adultery *or* both. Even if we ignore the fact that Mrs. Firestone was awarded alimony and thus could *not* have been found guilty of adultery under Florida law, the mere fact that the Judge failed to state which of the grounds he granted the divorce on does not give Time, Inc., or anyone else, the license to assume it was granted on all grounds. Rather, the decree immediately puts one on notice that only the Judge knows which of the grounds he based the divorce upon. Printing an article that the divorce was granted on both grounds is not only negligent, but is in reckless disregard of the fact that we simply do not know which of the grounds support the divorce decree.

Time, Inc. argues that proper editorial procedure was used and that there was no evidence whatsoever of actual malice or negligence on its part. However, none of the sources of information that came to Time, Inc. indicated Mrs. Firestone was found guilty of adultery, except the statement from their stringer Delaney. Did this raise serious doubt in Time, Inc.'s eyes as to its truth or falsity? Evidently so. After the article was written, Miss Nadasdy was to perform an accuracy check and place over each word in the article a line showing that it had in fact been sufficiently checked and was accurate (A.178). Her failure to check and mark the word "adultery" is clearly evidence that there was serious doubt, at least in her mind, as to its accuracy or its truth or falsity. This certainly indicates serious doubt as to whether they had checked the word out sufficiently to go ahead and publish it as being an accurate statement. That doubt, in and of itself, clearly indicates that Time, Inc., while doubting whether a statement that Mrs. Firestone was found guilty of "adultery" was accurate, was guilty of reckless disregard in going ahead and publishing nationwide an article labeling Mrs. Firestone an adulteress, simply because it was expedient to do so in order to meet the deadline they were working against.

In an attempt to show that there was factual dispute for the jury to decide, Time, Inc. argues that there was no conflict between the testimony of Delaney and Farish, Jr. Delaney stated that the "technical grounds for the divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given an extreme cruelty and adultery" (Pl.Ex.4,A.101,532). Time, Inc., argues that Farish stated the very same thing and quotes Farish's testimony to the effect " 'I said Mr. Firestone had accused her of extreme cruelty and adultery' (A.135) and agreed that he and De-

laney had discussed that 'the technical grounds for divorce *as alleged in the complaint* were adultery and extreme cruelty' (A.147)." Certainly these statements are not the "same", as Time, Inc. contends. The key words in Farish's testimony are, of course, "as alleged in the complaint". It can clearly be seen that Delaney stated that Farish had told him the divorce was granted on grounds of extreme cruelty and adultery (A355-356). However, Farish's testimony was that he and Delaney discussed the fact that the *allegations in the complaint* were adultery and extreme cruelty (A.147). Moreover, Farish specifically testified that he told Delaney that Mrs. Firestone had *not* been found guilty of adultery (A.133-137, 147). Their testimony could clearly not be more conflicting.

Time, Inc. next argues that even though there was a conflict in the testimony, Delaney's testimony was irrelevant since Time, Inc. is allowed to rely upon the information supplied to it by Delaney, its reporter in the field. However, this fact could clearly not preclude this case from going to the jury since Time, Inc. is not being made to account for any acts of negligence on the part of Delaney, which were imputed to Time, Inc. Rather, Time, Inc. is being held to account for its own independent acts of recklessness where the facts reveal that none of the documents that Time, Inc. claims it relied upon indicated or implied that Mrs. Firestone was found guilty of adultery, and where there was evidence to show that Time, Inc. even doubted the validity of Delaney's statement that Mrs. Firestone had been found guilty of adultery. Certainly the evidence reveals that Nadasdy doubled that the word "adultery" used in the article was accurate or sufficiently checked out since she had not placed the mark, required by Time, Inc., itself, to pe placed over every word in the article after it had been checked out and found to be accurate.

Time, Inc. attempts to equate the photographer in *Cantrel v. Forest City Publishing Co.* (1974) 95 S.Ct.465 to Delaney in this case. The fact that Delaney is a "stringer" and not a photographer is sufficient to distinguish the two. Moreover, Time, Inc. states that Cantrell held that since the photographer had not participated in the editorial process (i.e.), in writing or editing the Time article, his knowledge was not to be imputed to Time, Inc. That is *not* what *Cantrell* held. *Cantrell* held that there was insufficient evidence to support the jury verdict against the photographer since there was no evidence that he was in any way responsible for the inaccuracies and misstatements contained in the text of the articles written. In the present case, there is evidence that Delaney was in some way responsible for printing that Mrs. Firestone had been found guilty of adultery, when she had not been. However, none of this really makes any difference since Mrs. Firestone is not attempting to impute Delaney's acts to Time, Inc. It is the independent acts of negligence on the part of Time, Inc.'s staff members that constitutes publication with recklessness—the fact of publication when it was evident that Time, Inc.'s own employees seriously doubted its truth.

II.

WHETHER PETITIONER'S NEWS ITEM WAS A A RATIONAL INTERPRETATION OF AN AMBIGUOUS DOCUMENT UNDER *PAPE* AND THUS ENTITLED TO FIRST AMENDMENT PROTECTION?

The Florida Supreme Court's decision is not incompatible with *Time, Inc. v. Pape* (1971) 91 S.Ct.633, 401 U.S.282. It should first be noted that that case, which concerned a public official, is applicable to the present case only if it is found that the New York Times doctrine

is applicable, which it is not. It therefore follows that *Pape* is completely inapplicable.

At times Time, Inc. appears not to claim that it relied upon its interpretation of the language in the divorce decree as a basis for the article in question. It cannot do so, of course, because Time, Inc., prior to printing the article, failed to have any of its employees or agents secure a copy of the divorce decree and read it. Hence, there was no reliance by Time, Inc. upon any so-called ambiguous language in the decree. However, at other times, Time, Inc. attempts to confuse the issue by pointing to portions of the divorce decree as set out in its brief and arguing that since the decree granted the husband's counterclaim, without specifying upon what grounds, Time, Inc.'s interpretation that Mrs. Firestone had been found guilty of adultery was a rational one. It can only be once again stressed that Time, Inc. did not read or rely upon the divorce decree in writing its "Milestones" article. Hence, Time, Inc. cannot now be heard to argue backwards and rely upon any ambiguity it might "after the fact" find to exist in the divorce decree.

Time, Inc. tries to bring this case within *Time, Inc. v. Pape, supra*, by arguing that even though it never saw the divorce decree prior to printing the article in question and therefore cannot claim it relied upon any ambiguity in the decree itself), that it wrote the article in question based upon its interpretation of four documents: an AP dispatch (Def.Ex.1, A.99,543); two dispatches from its Miami office (Def. Ex.2, A.230,544; Pl.Ex.4, A.532); and a New York newspaper article (Def. Ex.3, A.545). It is these documents that Time, Inc. claims were misleading, and which allegedly led Time, Inc. to label Mrs. Firestone an adulteress. However, none of the documents state or

imply that Mrs. Firestone was found guilty of adultery. Certainly, there was nothing in those four documents to warrant a finding as a matter of law that Time, Inc. had adopted one of a number of possible rational interpretations of the documents. They are not ambiguous. They all state that Mrs. Firestone was "accused" of adultery. Time, Inc. merely went one step further and drew the further inference that she had been found guilty of adultery. However, that was not because of any ambiguity in the documents, but rather was because of Time, Inc.'s own recklessness.

Thus, Mrs. Firestone would submit that *as a matter of* law Time, Inc.'s interpretation of the three dispatches and the newspaper article it claims it relied upon was not a rational one. Certainly it can not be found that Time, Inc.'s interpretation of those three documents, which in no way stated or implied that Mrs. Firestone was found guilty of adultery, was rational. This case is clearly distinguishable from *Pape* in that regard. In *Pape*, reasonable men could not differ as to whether Time, Inc.'s interpretation of the Civil Rights Commission Report was rational. In the present case, however, reasonable men can not differ as to whether Time, Inc.'s interpretation was *not* rational.

III.

WHETHER AN "ACTUAL MALICE" TEST SHOULD HAVE BEEN APPLIED AND THE ACTION DISMISSED ON THE FIRST AMENDMENT GROUNDS?

a. *Whether the "actual malice" test should apply to reports of judicial proceedings?*

Time, Inc. argues that the New York Times doctrine should apply to reporting judicial proceedings. It is argued

that this is suggested in the concurring opinion of Justice White in *Rosenbloom v. Metromedia* (1971) 91 S.Ct. 1811. However, it is clear that Justice White was not even speaking of reports of judicial proceedings, but was expressing his opinion that discussion of the conduct of public officials cannot be subjected to artificial limitations designed to protect private individuals involved in an episode with officials from unfavorable publicity. His holding was specifically stated as:

> "I would accordingly hold that in defamation actions, absent actual malice as defined in New York Times Co. v. Sullivan, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the privacy of an individual involved in or affected by the official action be spared from public view. . . ."

Time, Inc. next argues that the New York Times doctrine was extended to reports of judicial proceedings in *Cox Broadcasting Corp. v. Cohn* (1975) 95 Sup.Ct.1029 and thus proof of "actual malice" is required. This is clearly not so. *Cox* merely held that the First and Fourteenth Amendments would not allow the state to expose the press to liability for truthfully publishing information released to the public in official court records. There is clearly no statement implying that "actual malice" is required to be shown.

Even if reckless disregard or "actual malice" is the appropriate standard, the evidence clearly reveals that Time, Inc. was guilty of reckless disregard or malice in publishing that Mrs. Firestone was found guilty of adultery where their employee, Miss Nadasdy, failed to make the

accuracy check in regard to the word "adultery", a check which Time, Inc. itself required to be performed. Daniels, the senior editor, freely admitted that Miss Nadasdy had failed to meet that requirement. Nonetheless, the article was published by Time, Inc. without checking further because it had to make the publication deadline. Certainly the evidence reveals that Miss Nadasdy felt that, even in light of the dispatch from Delaney she had insufficient information and/or insufficient sources to allow her to conclude that the word "adultery" was accurate. Publishing the article in spite of this doubt as to its accuracy was reckless.

b. *Whether the "actual malice" test applies because Respondent was a public figure?*

A review of the caselaw indicates that Mrs. Firestone was not a "public figure". Because the designation of a person as a "public figure" results in a decrease of the protection against defamation and invasions of privacy, such designations should not be made lightly. Legal rules providing for such a designation should afford the most complete protection of an individual's privacy consistent with the purposes of the First Amendment.

The categorization of a person as a "public figure" is bottomed upon the fact that the person has "voluntarily placed himself in the public spotlight". *Gertz v. Robert Welch, Inc.* (1974) 94 S.Ct.2997 further defines "public figures at page 3008 as:

> "Those who, by reason of the notoriety of their achievements or the vigor and success with which they *seek the public's attention*, are properly classed as public figures. . . ." (emphasis added)

In regard to both "public officials" and "public figures" Gertz states at 3009:

> "More important than the likelihood that private

individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in Garrison v. Louisiana, 379 U.S.64,77 (1964), the public's interest extends to 'anything that might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.'

Those classed as *public figures* stand in a similar position, Hypothetically, it may be possible for someone to become a public figure through no *purposeful action of his own*, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have *thrust themselves to the forefront of particular public controversies* in order to influence the resolution of the issues involved. In either event, they *invite attention and comment.*

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have *voluntarily exposed*

> *themselves to increased risk of injury from defamatory falsehoods* concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office nor assumed an 'influential role in ordering society.' Curtis Publishing Co. v. Butts, supra, 388 U.S. at 164 (opinion of Warren, C.J.). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."

As can be seen, a "public official" seeks public office and hence voluntarily exposes himself to the increased risk of injury from defamation. It is likewise with a "public figure" who through purposeful action of his own assumes a "influential role in ordering society" by occupying a position of persuasive power and influence or by thrusting himself to the forefront of particular public controversies. The one common denominator in these "public persons" is voluntary exposition of themselves to the increased risk of injury from defamation.

In the present case, Mrs. Firestone engaged in no purposeful action of her own which thrust her to the forefront of a particular public controversy. She clearly did not voluntarily expose herself to an increased risk of injury from defamation. Mrs. Firestone was the wife of a wealthy man and nothing more. If Mrs. Firestone and the Firestone divorce were written about in the newspapers it was only because the newspapers took it upon themselves to delve into her private life and publicize it to the world.

Time, Inc. argues that Mrs. Firestone's divorce was

a public controversy and that the mere fact that she was a party to the divorce action made her a public figure. This is only a round about way of essentially arguing that Mrs. Firestone's divorce was a matter of public interest under *Rosenbloom v. Metromedia, supra. Rosenbloom* held that the New York Times doctrine extended to private persons if the statement concerned matters of general or public interest. However, *Gertz* has now limited or modified *Rosenbloom* to the extent that it no longer applies to private individuals. *Gertz* makes it clear that private individuals do not become public figure subject to damaging falsehoods concerning their lives without recourse when they are suddenly thrust into the news. When chance and the news media bring a private citizen into the public eye, the right to redress for defamation is not diminished so long as their notoriety was not of their own choosing. The right to recover damages for the dissimination of untruths about themselves without proving actual malice by the dissimenator is retained. The requirement of proof of malice under the New York Times doctrine does not extend to private individuals who have not risen to public renown by their own activity.[1]

Essentially Time, Inc. argues that anyone filing for separate maintenance (as in this case) or divorce becomes a public figure because the *divorce* is a public controversy. Again, that argument is *Rosenbloom* all over again. Under *Gertz*, filing for a divorce can not make a person a public figure, unless the person already is a public figure in his own right. In other words, the divorce of a

[1] Contrary to Time, Inc.'s contention, there was never any argument in either of the Florida appellate courts that Mrs. Firestone was a public figure. Time, Inc.'s only argument was that Mrs. Firestone's divorce was a matter of public interest under Rosenbloom. Time, Inc. is now changing horses midstream because, of course, *Gertz* no longer sanctions that argument.

person who is a public figure may be written about and the courts can not be called upon for redress of injury inflicted by defamatory falsehood without proof of malice. However, a private person does not become a public figure merely because he files for divorce. Hence, that person does not have to prove malice in a defamation action arising out of an article written about the person and his divorce.

Time, Inc. refers to a number of newspaper articles written about Mrs. Firestone's divorce in an attempt to show that Mrs. Firestone was a "public figure". However, the fact that newspapers chose to write about Mrs. Firestone's divorce in no way means that she is a "public figure". Under *Gertz*, the news media can not make a private individual who is seeking a divorce a "public figure" merely by writing about him.

In a weak attempt to show that Mrs. Firestone was a public figure, Time, Inc. quotes the following language from one of the Florida Supreme Court decisions:

> "Sadly, however, their marital difficulties were equally well known; and the charges and countercharges of meretriciousness, flowing from both sides of the controversy, made their divorce action a veritable cause celebre in social circles across the country. Additionally, as the District Court observed:
>
> > 'The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
> >
> > The Associated Press flashed news of the de-

> cree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . .' "

Again, Time, Inc. is attempting to argue that the fact that the newspapers chose to publicize Mrs. Firestone's divorce to the world made her a "public figure". However, it is clear under *Gertz* that Mrs. Firestone can not be *made* a "public figure" by the newspapers because of publications of her divorce, where she was not a "public figure" of her own right, which she clearly was not. There is absolutely nothing in the record to support a conclusion that Mrs. Firestone was a public figure in her own right. She was merely a housewife who had the misfortune of being married to a wealthy man. Mrs. Firestone was even found to be a private individual by the Fifth Circuit in another suit by Mrs. Firestone against Time, Inc. for publication of an article relating to the Firestone marital difficulties and electronic eaves dropping employed in connection with the divorce action. *Firestone v. Time, Inc.* (1972) 460 F.2d 712 at page 718.

Time, Inc. chose to write about a private individual, the wife of a wealthy man. They falsely publicized to the nation that she was an adulteress. Under *Gertz*, she is not required to prove that the publication was with malice or reckless disregard.

IV.

WHETHER, UNDER *HILL* AND *GERTZ*, WITHDRAWAL OF A CLAIM FOR DAMAGE TO REPUTATION REQUIRES THAT AN "ACTUAL MALICE" TEST BE APPLIED AND THE ACTION DISMISSED ON THE FIRST AMENDMENT GROUNDS?

Time, Inc. contends that application of *Gertz*, *supra*, to the present case required proof of actual malice since Mrs. Firestone did not claim, as an element of damages, damage to reputation. It is Time, Inc.'s contention that the state interest referred to in *Gertz* is an interest in protecting reputation and that since Mrs. Firestone did not seek a claim for damages to reputation, there was no state interest to protect and thus actual malice had to be proved. *Gertz* simply and plainly does not stand for that proposition. The legitimate state interest underlying the law of libel referred to in *Gertz* is "the compensation of individuals for the harm inflicted on them by defamatory falsehoods". *Gertz* p.17. This compensation by way of a damage award, can be proved by a private individual by showing actual damages, rather than presumed damages. *Gertz* pp.25-26. The rationale is that a state has no substantial interest in securing for a plaintiff "gratuitous awards of money damages far in excess of any actual injury." As stated in *Gertz* p.26:

> "We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehoods include impairment of reputation and standing in the community, personal humiliation, and mental

> anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

In light of *Gertz*, the Florida Supreme Court stated in the present case (A.627-628):

> "Sub judice, the trial judge properly instructed the jury that if libel is proven by the greater weight of the evidence *which caused actual damages* to the plaintiff, they should award plaintiff an amount of money that will fairly and adequately compensate her for such damages, and instructed that *'It is only damages which are a direct and natural result of the alleged libel* which may be recovered. If you find the plaintiff is entitled to recover damages, you may consider any shame, mortification, mental anguish, or hurt feelings experienced in the past or to be experienced in the future, if any, which you find from the evidence. There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in light of the evidence.' The jury heard the testimony and considered the evidence before it, and the factors enumerated in the instruction of the trial judge which are the same as those set out by the Supreme Court of the United States in Gertz, supra, and upon the evidence decided that a just and fair award for the damages suffered by petitioner would be $100,000. This award is supported by competent evidence concerning the injury. As aforestated, the Supreme Court of the United States in Gertz, supra, recognized that there need be no evidence which assigns an actual dollar value to the injury."

It can be seen that in the present case, the jury was instructed on actual, rather than presumed, damages in accordance with *Gertz*.

It is next argued that "actual malice" was required in *Time, Inc. v. Hill* (1967) 87 S.Ct.534, which was an invasion of privacy suit, and that the present case is essentially the same as *Hill* since Mrs. Firestone's claim for damage to reputation was withdrawn. While *Hill* applied the New York Times doctrine to invasion of privacy suits and thus adopted a standard of malice or reckless disregard, this was before *Gertz, supra*. As stated by Justice Powell in footnote #2 of his concurring opinion in *Cox Broadcasting, supra, Gertz* has called into question the conceptual basis of the *Hill* case, since under *Gertz* a state may now constitutionally apply a more relaxed standard of liability in a "false light" invasion of privacy case where a private individual is involved.

It can be seen that neither *Hill* nor *Gertz* require proof of malice if there is not a claim for damage to reputation. In the present case, there was a claim for mental pain and suffering, shame, mortification and hurt feelings and that was sufficient.

CONCLUSION

Based upon the foregoing, the judgment in favor of Mrs. Firestone should be affirmed. However, even if error were to be found in any of the foregoing points, the most that would be required is a new trial. There is certainly no basis for entry of a judgment in favor of Time, Inc., as it so urges.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Harold R. Medina, Jr., One Chase Manhattan Plaza, New York, New York, 10005, by mail, this 13th day of June, 1975.

By .....
ROBERT M. MONTGOMERY, JR.
and
EDNA L. CARUSO

Supreme Court, U. S.
FILED
JUL 1 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-944

TIME, INC., PETITIONER,

v.

MARY ALICE FIRESTONE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Statement

Respondent's legal arguments are fully covered in our main brief. However, there are certain factual misleading or inaccurate statements in respondent's brief which make correction necessary. Thus, this short reply.

ARGUMENT

Serious doubts as to truth

Respondent's basic contention in this regard, which runs throughout her brief (pp. 5, 6, 11, 12, 16, 17), is that the Time Researcher, Ursula Nadasdy, failed, on the "checking" copy (Pl. Ex. 5, A. 199, 533), to "check" the word "adultery." But that omission furnishes no support for any finding of "actual malice." Respondent fails to note that 12 other words in the short news item also were not checked. Moreover, respondent also carefully fails to note the testimony as to the significance of that omission, which estab-

lishes that it meant precisely nothing. Thus, Researcher Nadasdy testified (A. 198):

> "Q. You just told us, as I understood it, the requirement in Time is to place a mark above each word to be checked and indicate that it has been checked, that word has been checked, is that correct?
>
> "A. No, I did not say that. Right now I didn't quite say that. That is in the affidavit, fine, but it said generally when cases are marked, but when you turn in the checking copy even if you haven't placed a mark on something, it means—wait, please, it means that you have—once you have turned the checking copy in, you, unless you mark very clearly that something is wrong with it, that it is otherwise—it has your stamp of approval. It has your stamp of approval once you have turned the checking copy in, though generally you mark every word, or try to."

Again, Editor Daniels testified on the same subject (A. 298):

> "Q. The thing speaks for itself. Since the word 'adultery' is not checked as Time requires it, what did that mean to you when you saw that copy?
>
> "A. I very often do not see this checking copy I see what's called a yellow—what happens here, this is initialed by the researcher, goes to the copy desk, they transfer the changes to what we call the hard copy and that's what I see finally.
>
> "Q. Well, you mean before—you let this article out without seeing where the researcher had actually checked each word for accuracy, sir?
>
> "A. The assumption is when she initials it here it's checked for accuracy, whether there is a dot

> missing over the word, the assumption is she has checked every word, whether a pencil slipped or not, didn't put a dot over 'trial' or 'month' or 'they' or '42,' the word 'adultery,' the assumption is when she signs it and turns it in it's checked and if she has a problem with it she takes it up with the writer or up with me."

And again, (A. 299):

> "Q. May I ask you this question, please, sir. The absence of the mark over the word 'adultery' did not even, you did not see it, is that correct, did you see one like it?
>
> "A. It doesn't mean anything, sir.
>
> "Q. Who would have seen it in order to make sure that this word was checked for accuracy, anyone other than Mrs. Nadasdy?
>
> "A. Mrs. Nadasdy is responsible for the checking, when she signs it, she indicates by her initials that it is checked and it is accurate."

There is thus no possible reflection upon the good faith of petitioner's editorial personnel to be derived from the fact of a lack of one "check" mark. Their testimony as to their complete belief in the truth of the news item as printed, both at the time of the publication and at the time of the trial, stands unimpaired (A. 239-41, 267, 304, 338-39).

Fault

Respondent's argument in this regard has but one predicate, and that is false. Thus, it is repeatedly stated in respondent's brief (pp. 7, 10, 12, 14, 15) that: "None of those documents stated or implied that Mrs. Firestone was found

guilty of adultery", referring to the four documents, *i.e.*, the AP dispatch (Def. Ex. 1, A. 99, 543), the Daily News clipping (Def. Ex. 3, A. 406, 545), and the Duncan Miami (Def. Ex. 2, A. 230, 544) and Delaney Palm Beach (Pl. Ex. 4, A. 101, 532) dispatches, which petitioner's editorial personnel had before them. Nothing could be further from the truth.*

The Delaney dispatch (Pl. Ex 4, A. 101, 532) stated explicitly that: "The technical grounds for divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultery." Researcher Nadasdy (A. 213-16, 226, 239), Writer Doerner (A. 338, 340) and Editor Daniels (A. 265-66, 283-84, 302) all testified that they relied on that statement in the Delaney dispatch as a principal predicate for the statement concerning the grounds of the divorce.

Moreover, the other three documents clearly implied that adultery was a ground for the divorce. Thus, the AP dispatch (Def. Ex. 1, A. 99, 543) stated that Russell Firestone was granted a divorce from respondent whom "he had accused of adultery and extreme cruelty" and quoted Judge Knott's opinion referring to the "extra-marital escapades" of respondent "which would have made Dr. Freud's hair curl". Those same references were repeated in the New York Daily News clipping (Def. Ex. 3, A. 406, 545).** The Duncan dispatch (Def. Ex. 2, A. 230, 544) made reference to the quotation dealing with respondent's "marital escapades" and Dr. Freud. The inference of a finding of

*Respondent also appears to rely on lack of "domestication" as the *real* ground for the divorce (br. pp. 1, 3, 4). But that was not in 1967 a legal ground for divorce in Florida. Fla. Stat. 61.041.

**Except that the Daily News merely stated "accused of adultery" and not "accused of adultery and extreme cruelty" as did the AP dispatch. For that reason, Doerner's first draft written Friday, Dec. 15 based solely on those two items referred solely to adultery (A. 337).

adultery is thus inescapable in the material before petitioner's editorial personnel.

For respondent to state that: "None of those documents stated or implied that Mrs. Firestone was found guilty of adultery," flies in the face of the record and is thus incredible.

Moreover, and as an adjunct to those misstatements, there is reference in respondent's brief (p. 5) to the content of the documents before Writer Doerner when he wrote the first draft of the article (Pl. Ex. 9, A. 310, 537). No reference is made to the fact that the first draft was written on Friday, December 15, based solely on the AP dispatch and the New York Daily News clipping, as testified by Doerner (A. 318, 334). Of course, that was before receipt of the Delaney dispatch on Saturday, December 16, with its reference to the conversation which Delaney had with respondent's attorney Joseph Farish, Jr., respecting the "technical grounds" for the divorce.

Truth

Respondent's brief in its discussion of truth (pp. 7-9), completely ignores the categorical finding of the District Court of Appeal that: "The publication fairly and accurately reported the final judgment" (279 So. 2d at 394, A. 620). That finding stands unimpaired and is the conclusive answer to respondent's contentions.

Damage

The discussion in respondent's brief (pp. 23-25) of claimed damage is completely belied by common sense, where reputation is not in issue. Under respondent's contentions a notorious criminal could merely disclaim damage to reputation and recover for libel on a charge of theft, which is precisely what respondent is here attempting. Per-

tinent in that regard is the recent opinion of the United States Court of Appeals for the Second Circuit, rendered June 16, 1975, in *Cardillo* v. *Doubleday & Company,* 74-2543, holding that, where, as here, reputation is not in issue, a plaintiff is "libel-proof" and that the action must therefore be dismissed under the First Amendment. A copy of that opinion is annexed hereto as Appendix A for the convenience of the Court.

Public figure

Finally, respondent persists in the mistaken assertion that petitioner did not argue public figure below. As noted in petitioner's brief at p. 36, that assertion is completely belied by the record and in any event petitioner is entitled to argue public figure in this Court even if the point had not been argued below.

Additionally, petitioner's contention that respondent's action in instituting and participating in the divorce suit suffices to render her a public figure (br. pp. 34-5) has been inferentially upheld in a recent opinion by the United States District Court for the District of Columbia, rendered June 23, 1975, in *Buchanan* v. *Associated Press,* Civ. No. 74-323 (a copy of that opinion is annexed hereto as Appendix B for the convenience of the Court). The court held that a plaintiff by voluntarily acting as an accountant for the Finance Committee to Re-elect the President became a public figure and a "legitimate object of searching public scrutiny", stating (App. B p. 12):

> "In sum, given his extensive involvement with the Finance Committee his willingness to participate and assist the Committee in any way they requested, and the intense public interest in the precise activities in which he participated, the court must conclude that Mr. Buchanan justly is classified as a public figure for the purposes of this suit."

CONCLUSION

There is thus not one whit of either factual or legal valid argument to detract from our main brief. For the foregoing reasons, and for the reasons set forth in that main brief, the order of the Supreme Court of Florida of December 11, 1974 (305 So. 2d at 178, A. 630-31), should be reversed and this case remanded to that Court with directions that the orders of the District Court of Appeal of Florida, Fourth District, of October 28, 1971, and June 20, 1973, be reinstated, and entry of judgment in favor of petitioner be directed.

Respectfully submitted,

June 25, 1975.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 787—September Term, 1974

(Argued May 13, 1975 Decided June 16, 1975)

Docket No. 74-2543

ROBERT L. CARDILLO,

Appellant,

v.

DOUBLEDAY & CO., INC., THOMAS C. RENNER, VINCENT TERESA and FAWCETT PUBLICATIONS, INC. d/b/a TRUE MAGAZINE,

Appellees.

Before KAUFMAN, *Chief Judge,* OAKES, *Circuit Judge,* and JAMESON, *District Judge.**

MAURICE N. NESSEN (NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN & SOLL, New York, New York, of counsel), for Appellant,

JAMES E. RITTINGER (ROBERT M. CALLAGY, SATTERLEE & STEPHENS, New York, New York, of counsel), for Appellees.

OAKES, *Circuit Judge*:

Robert Cardillo, presently incarcerated at the United States Federal Penitentiary at Lewisburg, Pennsylvania,

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*Of the District of Montana, sitting by designation.

appeals from an order of the United States District Court for the Southern District of New York, Murray I. Gurfein, Judge, dismissing petitioner's civil libel suit and granting summary judgment for the appellees on the grounds that publication of *My Life in the Mafia* is protected by the First Amendment to the Constitution. We affirm.

Petitioner's complaint alleged that Doubleday & Co., Inc., Thomas Renner, Vincent Teresa, and Fawcett Publications published libelous statements about him in a book written by Renner and Teresa entitled *My Life in the Mafia*. Teresa is said in the book to be a high ranking figure in organized crime who became a Government witness and eventually published his story. Cardillo had known Teresa and was mentioned in Teresa's book as taking part in various criminal enterprises. Teresa is still under federal protective custody and has been the chief witness against over 20 individuals, including Cardillo himself, who have been convicted largely as a result of his testimony.

Judge Gurfein granted the appellees' motions to dismiss and for summary judgment under Fed. R. Civ. P. 56 on the basis of *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), and *Kent* v. *City of Buffalo*, 29 N. Y. 2d 818, 277 N. E. 2d 669, 327 N. Y. S. 2d 653 (1971), holding that the book is "a matter of legitimate public interest." Judge Gurfein found no actual malice in the publication of the book, that no statements were made "with knowledge that they were false or made with reckless disregard of whether or not they were false. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964)." He based his findings on the allegations in the affidavits that the editors and author Renner did extensive substantiation of the contents of the book. Finding the *Rosenbloom* and *Kent* cases sufficient for granting appellees' motions, Judge Gurfein stated that it was not necessary to reach the issue "whether the plaintiff is libel-proof because of this conviction and consequent incarceration." This appeal followed.

Cardillo argues that the New York Court of Appeals would limit its decision in *Kent* taking advantage of the latitude given in the development of state libel laws by the Supreme Court in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). *Gertz*, decided after Judge Gurfein's decision below, permits states to disallow the *New York Times* v. *Sullivan* defense when neither public officials nor public figures are involved. Cardillo also claims that summary judgment should not have been granted because there were disputed issues of fact as to whether he is a public figure within *Curtis Publishing Co.* v. *Butts* and its companion case, *Associated Press* v. *Walker*, 388 U. S. 130, 162 (1967), and whether appellees were negligent or acted with malice.

We need not determine whether New York would abandon *Kent* in the light of *Gertz* v. *Robert Welch, Inc., supra*, whether the appellees can claim the *Sullivan* privilege on grounds that appellant is a public figure by virtue of his criminal trials or whether summary judgment was appropriate. For we consider as a matter of law that appellant is, for purposes of this case, libel-proof, *i.e.*, so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations. *See Urbano* v. *Sondern*, 41 F. R. D. 355, 357 (D. Conn.), *aff'd*, 370 F. 2d 13 (2d Cir. 1966), *cert. denied*, 386 U. S. 1034 (1967); *Mattheis* v. *Hoyt*, 136 F. Supp. 119, 124 (W. D. Mich. 1955). *See also Gertz* v. *Robert Welch, Inc.*, 418 U. S. at 349 ("States may not permit recovery of presumed or punitive damages. . . ."). We by no means intend to suggest that prison inmates can be deprived of access to federal diversity jurisdiction to obtain redress of wrongs, including libels, committed against them

whether they are in or out of prison. But here appellant is serving 21 years, sentenced for assorted federal felonies, including separate convictions for stolen securities and bail-jumping in the United States District Court for the Southern District of Florida, bail-jumping in the District of Maryland, and conspiracy and interstate transportation of stolen securities in the District of New Hampshire. He has been previously convicted of receiving stolen property and numerous minor infractions of the law in Massachusetts where he lived. His answers to interrogatories indicate that he was in Teresa's company "frequently" from 1963-69, knew Teresa to be a petty thief and confidence man, and was "directly involved" with Teresa "in several minor crimes, none of which were noteworthy or profitable." While he denies participation in a robbery mentioned by Teresa (*My Life in the Mafia* at 176) at, or above, Lindenbaum's Laundromat and claims that much of Teresa's story is fantasy, from 1967 to early 1969 he admits that Teresa, who was then in possession of a considerable quantity of money, and a "Joe Black" each told him they were in a "shylocking and bookmaking operation" (although he says Teresa was swindled by Black). He denies participation in numerous other specific crimes referred to in the appellees' book, including fixing a specific race, the Constitution Handicap at Suffolk Downs, but he was indicted in Massachusetts for fixing races at that track and apparently not tried only because of his present incarceration. The records of the House Select Committee on Crime, 92d Cong., 2d Sess., on Organized Crime in Sports (Racing) contain testimony at page 738 (May 24, 1972) of Joseph "The Baron" Barboza, a former organized crime "enforcer" substantiating Teresa's claim that Cardillo frequented the "Ebb Tide" which was where "the mob generally hung out" and that Cardillo fixed races at Suffolk by slowing down the favorites with drug injec-

tions. With Cardillo himself having a record and relationships or associations like these, we cannot envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages, even if Cardillo were to prevail on the difficult legal issues with which he would be faced.

Accordingly, we affirm the judgment below.

Judgment affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-323

HENRY M. BUCHANAN and HENRY M. BUCHANAN, C.P.A., P.A.,

Plaintiffs,

v.

ASSOCIATED PRESS and STEVEN COHEN,

Defendants.

MEMORANDUM OPINION

This matter is before the court on defendants' motion for summary judgment and plaintiffs' opposition thereto. The court has considered the extensive memoranda, exhibits, and depositions submitted by counsel and has heard oral argument. This case involves an alleged libel and invasion of privacy based upon an Associated Press wire report of a judicial hearing. For the reasons set forth in this Memorandum Opinion, defendants' motion should be granted.

I. Factual Background

Counsel have set forth in their papers most of the relevant factual background in this case. Thus, the following will be only by way of summary. Plaintiff Henry M. Buchanan is a certified public accountant with offices in Bethesda, Maryland. Plaintiff Henry M. Buchanan, C.P.A., P.A. is a professional association of accountants of which

Mr. Buchanan is the principal shareholder and president. In March, 1971 Mr. Buchanan and his firm were retained to perform accounting services for the Finance Committee to Re-elect the President. Thereafter Mr. Buchanan and his firm assisted the Committee in setting up its charge of accounts, books of account, and its disbursements journal and assisted generally in its overall accounting system. Mr. Buchanan also on several occasions advised the Committee when reports of expenditures and contributions by political committees were required to be filed under the Federal Corrupt Practices Act. Mr. Buchanan and his firm also allowed the Committee to use Mr. Buchanan's agency account for purposes of making disbursements. The Committee sent Mr. Buchanan four checks totalling $11,000. He deposited these checks in the agency account and thereafter withdrew sums of money or drew checks on the account. Then he would give the Committee the checks that had been drawn or the cash he had withdrawn. Mr. Buchanan was told that some of the checks he gave to the Committee were to supplement the salary of a certain Committee employee and that other checks were to pay invoices. However, he was never told and never asked the purpose of the cash which he forwarded to the Committee.

During the entire pre-1972 election period there was extensive public interest in the problem of campaign financing. Under the existing law and under the law as amended, 2 U. S. C. §§ 242-43 (1970), *repealed,* Pub. L. 92-225, tit. IV, § 405, 86 Stat. 20 (1972), 2 U. S. C. § 432 (Supp. 1975), records had to be kept of virtually all campaign contributions and of all campaign expenditures. Criminal penalties were provided for violation of these provisions. *See* 2 U. S. C. § 252 (1970); *id.* § 441 (Supp. 1975).

In 1972 Common Cause brought suit, *Common Cause* v. *Finance Committee to Re-elect the President,* Civil Action No. 1780-72 (D. D. C.) to force the Finance Committee to report its contributions and expenditures during the period prior to April 7, 1972. It brought this suit under the Federal Corrupt Practices Act of 1925, 2 U. S. C. § 241 *et seq.* Expenditures and contributions occurring after April 7, 1972 were covered by the Federal Election Campaign Act of 1971, 2 U. S. C. § 431 *et seq.* which repealed the previous law. In the course of discovery in the *Common Cause* suit, Common Cause discovered that Mr. Buchanan had served as an accountant for the Finance Committee during the pre-April 7, 1972 period. Thus, Common Cause noted and took his deposition. The deposition revealed the type of accounting services that Mr. Buchanan had performed for the Finance Committee. In particular, the deposition revealed that on a number of occasions the Finance Committee had requested Mr. Buchanan to cash checks written on funds in his agency account, funds which previously had been supplied to him by the Finance Committee. Mr. Buchanan would cash the checks and send the cash to the Finance Committee. He admitted that he was a little disturbed by this procedure but that he complied with the request because he finally determined that there was no impropriety. Nevertheless, this was a strange procedure for the Finance Committee, especially since the Committee readily could have cashed checks itself at the bank in its own building rather than have its agent cash checks in Maryland and send the cash by messenger to downtown Washington. At one point Mr. Buchanan guessed that one purpose of this arrangement was to prevent the press from tracing the source of certain Committee funds.

The day after Mr. Buchanan was deposed in the *Common Cause* suit he, through his attorney, filed a motion for a protective order before Judge Joseph Waddy, seeking to have the deposition sealed. His reasoning was that disclosure of the contents of the deposition could only cause embarrassment to him. Pursuant to his motion a hearing

was held and the Associated Press on May 8, 1973 issued a wire release concerning that hearing. The wire release read as follows:

> WASHINGTON AP—The Nixon re-election committee used a Bethesda, Md., accounting firm to convert campaign checks into cash during 1971, it was revealed in U. S. District Court today.
>
> In a hearing before Judge Joseph C. Waddy, it was disclosed that the firm converted 11 checks into cash and turned them back to the campaign committee.
>
> It was the second revelation of checks being converted to cash and then fed back to the campaign.
>
> The earlier case involved $114,000 which passed through the Miami bank account of convicted Watergate conspirator Bernard L. Barker.
>
> The hearing today was in connection with a deposition given by Henry Buchanan, head of the accounting firm which handled the books of the Finance Committee to Re-elect the President.
>
> Buchanan's attorneys asked the court to keep under seal a deposition given by Buchanan in a suit filed by Common Cause, a citizen's group trying to force disclosure by the Nixon committee of pre-April 1972 contributions and expenditures.
>
> Waddy deferred a decision until he reads the deposition.
>
> But also disclosed during the hearing was that the accounting firm cashed five checks to supplement the salary of someone on the re-election committee staff and it cashed another three checks to pay invoices.
>
> Both sides agreed to keep under seal Buchanan's testimony relative to these eight checks.

> Kenneth Guido, lawyer for Common Cause, said after the hearing he did not know why the committee used Buchanan to cash the checks or what the cash returned to the committee was used for.
>
> Other depositions in the case have revealed that the committee raised up to $2 million in untraceable cash before April 7, 1972. Part of the money converted through Barker's bank account was traced to the men who burglarized and bugged the Democratic Party Headquarters in the Watergate office building last year.

Mr. Buchanan and his attorney immediately protested to Associated Press that its wire story was false, misleading and libelous. After further checking the Associated Press on May 14, 1973, requested all newspapers which carried the original wire to publish the following corrective wire:

> WASHINGTON AP—The Associated Press reported erroneously Tuesday that proceedings in a federal court hearing disclosed that the Nixon re-election committee used the accounting firm of Henry M. Buchanan to convert campaign checks into cash during 1971.
>
> A court transcript shows that no such disclosure was made during the hearing on a motion by Buchanan to keep sealed a deposition he gave in a suit filed by Common Cause against the Nixon committee.
>
> The Bethesda, Md., firm used a trust account, with funds provided by the Finance Committee to Re-elect the President, to supplement the salary of an unnamed committee employee and to pay by checks "certain individuals for service the individuals had rendered," according to the transcript.

U. S. Dist. Court Judge Joseph C. Waddy asked Buchanan's lawyer if the committee directed what expenditures should be made.

Buchanan's lawyer: "That is correct, except in several instances—I don't recall how many—there were certain checks which my client was asked to cash.

"He drew them to himself or to 'cash'. He endorsed them and negotiated them.

"He was immediately instructed to furnish the proceeds of the checks to the defendant, which he did.

"There were 19 expenditures in all during that period, between July and December of 1971."

Asked by Waddy if the sealed depositions disclosed "the names and addresses of contributors to political committees," Buchanan's attorney replied, "Not contributors, Your Honor, expenditures."

Common Cause, the self-styled citizens' lobby, seeks in federal court to force disclosure by the Nixon committee of contributions and expenditures before April 7, 1972, when the new federal campaign finance law went into effect.

Buchanan's attorney said making public his client's deposition would be embarrassing and an annoyance and would disclose "discussion of a confidential relationship between my client and the defendant."

Waddy deferred a decision until he reads the deposition.

It is the publication of the May 8, 1973 wire which plaintiffs allege to be a libel and an invasion of privacy. Plaintiffs allege that the Associated Press' May 8, 1973

wire report implies that plaintiffs converted campaign contribution checks to cash in violation of federal law. This implication allegedly is made stronger by the comparison to the Barker affair which did involve campaign contribution checks. Plaintiffs assert that defendants should have reported that campaign expenditure checks, not contribution checks, were involved in the case. In sum, plaintiffs assert that the story as reported was false and that they can recover for the libel and invasion of privacy on two grounds. First, they allege that there is sufficient evidence for a jury to infer that the publication was made with malice under the *New York Times* v. *Sullivan,* 376 U. S. 254 (1964) standard. Second, they allege that Mr. Buchanan was neither a public official nor a public figure and thus under *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974), they can recover under a standard of proof less demanding than set forth under *New York Times* v. *Sullivan.*

The instant motion for summary judgment by defendants presents a number of issues. First, defendants assert that despite their corrective wire report of May 14, 1973, this court should rule that the May 8, 1973 wire report is a substantially accurate report of a judicial proceeding and thus is not actionable. Second, defendants assert that even if the report was not accurate, Mr. Buchanan is a public figure and thus actual malice must be shown before liability can attach. Defendants urge that there is no showing of any evidence from which such malice could be inferred and thus that they are entitled to summary judgment. Finally, even if Mr. Buchanan were not a public figure, defendants urge that under applicable District of Columbia law, this court should apply the actual malice standard and grant defendants summary judgment. The court will deal with the first two assertions in turn; it is unnecessary to reach the third one.

I. Whether the May 8, 1973 Wire was a Substantially Accurate Report.

The Restatement, Second of Torts § 611 (Tent. Draft 21, Apr. 5, 1975) provides:

> The publication of defamatory matter concerning another in a report of any official proceeding or any meeting open to the public which deals with matters of public concern is conditionally privileged if the report is accurate and complete, or a fair abridgement of what has occurred.

The privilege is conditional and is lost when the publisher does not give a fair and accurate report of the proceeding. *Id.* Comment *b*.

> The reporter is not privileged under this Section to make additions of his own which would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.

Id. Comment *f*. Defendants make the following argument:

> The hearing transcript shows (a) that plaintiff was provided campaign funds by the Committee which he deposited in his agency account, (b) that plaintiff drew checks on the campaign funds in his agency account at the direction of the Committee, and (c) that plaintiff cashed the checks and returned the cash proceeds to the Committee as he was requested to do by the Committee. In light of these revelations, AP's characterization of the checks which Buchanan cashed as "campaign checks" was both accurate and appropriate.

Memorandum of Points and Authorities in Support of Motion for Summary Judgment by Defendants Associated Press and Steven Cohen, at 25, filed March 10, 1975. Plaintiffs, in essence, make two arguments against defendants' contentions: (1) that the failure to explicitly distinguish between campaign expenditures and campaign contribution checks made the wire report inaccurate and defamatory; and (2) that the addition of the comparison with the Barker affair is an addition which conveys a defamatory impression.

The court has reviewed with care the transcript of the hearing before Judge Waddy to determine whether those parts of the wire report specifically referring to that hearing are accurate and complete or a fair abridgment. The court finds it immaterial whether the campaign checks referred to in the report were expenditure checks or contribution checks—failure to properly record and report matters pertaining to both contributions and expenditures are violations of federal law. Further, the hearing itself was not altogether clear as to precisely the contents of the deposition. Under all of these circumstances, the court concludes that no genuine issue of material fact exists and that the report of the judicial proceedings with its reference to campaign checks was accurate and a fair abridgment of those proceedings.

However, the Associated Press did not merely report the judicial hearing. Rather, AP compared the matters concerning Mr. Buchanan with those widely reported concerning Mr. Barker. Such an addition does not come within the conditional privilege of section 611. The court concludes that a factual issue exists regarding whether the addition of the Barker analogy makes the entire wire report defamatory, false and outside of the privilege. *See Carey* v. *Hume*, 390 F. Supp. 1026, 1029 (D. D. C. 1975).

II. Whether The *New York Times* v. *Sullivan* Standard Applies in this Case.

For purposes of this aspect of the instant motion, the court will assume that the wire report does not constitute an accurate report of the judicial proceedings and that it is defamatory in nature. The court, however, must consider on this motion what standard of proof would apply at trial on this issue.

Defendants argue that plaintiffs, because of their involvement in matters of great public concern, are public figures and that the standards of *New York Times* v. *Sullivan, supra,* must apply to the defamatory statements. Public figure status may be achieved in two ways.

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

Gertz v. *Robert Welch, Inc., supra* at 351. In the instant case defendants claim that Mr. Buchanan became a public figure only in the second way—that is he actively participated in and was further drawn into a particular public controversy of great national interest. The question then is whether given the nature and extent of Mr. Buchanan's participation in the controversy of the Finance Committee's accounting for contributions and expenditures, the court should deem him a public figure. *Id.* at 351-52.

In considering whether Mr. Buchanan is a public figure the court first states that the controversy over the financing of the campaign for the election of the United States President was a matter of the greatest public concern. As the Supreme Court recently reiterated, anything that concerns an official's fitness for office is a legitimate matter for public

concern. *See id.* at 344-45. *See also Monitor Patriot Co.* v. *Roy,* 401 U. S. 265, 272-73, 275 (1971); *Oscala Star-Banner Co.* v. *Damron,* 401 U. S. 295, 300-01 (1971); *New York Times* v. *Sullivan, supra* at 240; *Thompson* v. *Evening Star Newspaper Co.,* 394 F. 2d 774 (D. C. Cir.), *cert. denied,* 393 U. S. 884 (1968). All of these cases—and others—demonstrate that the public interest in complete and uninhibited reporting of all events relating to the American political process is very compelling.

The court concludes that Mr. Buchanan's involvement in the area of the Finance Committee's accounting for various transactions relating to the re-election of former President Nixon is such that he must be classified as a public figure for purposes of this law suit. It is undisputed by the parties that there was intense public interest in the public finance and spending practices of campaign committees at the time Mr. Buchanan was working for the Committee. He, of course, knew of this public interest. He significantly assisted the Committee in setting up its accounting system—a system that was a legitimate area of public scrutiny, particularly given disclosures of irregularities in a variety of matters. And he assisted the Committee in making a series of cash transactions whose purpose he did not know. These cash transactions also were matters of legitimate public concern given the federal requirement calling for accurate accounting of all Committee expenditures. Mr. Buchanan was a key person in efforts to investigate this unusual, if legal, accounting practice. In this aspect of his work with the Committee, he was standing in an agency relationship with the Committee. Since the Committee was surely the legitimate object of searching public scrutiny, its agents, particularly those handling cash transactions at a time when money transactions were extremely suspect, also must be examined carefully and come within the area of great public concern. *See Time, Inc.* v. *McLaney,* 406 F. 2d 565, 573 (5th Cir.), *cert. denied,* 395

U. S. 922 (1969). In this aspect Mr. Buchanan volunteered his services—he willingly accepted his accountant's role. In fact, at one point he agreed to assist further the Republican effort by becoming a chairman of a small campaign committee. While his role as campaign committee chairman did not last long and involved little activity, it demonstrates Mr. Buchanan's willingness to become a part of an area of intense public concern. In sum, given his extensive involvement with the Finance Committee, his willingness to participate and assist the Committee in any way they requested, and the intense public interest in the precise activities in which he participated, the court must conclude that Mr. Buchanan justly is classified as a public figure for the purposes of this suit.[1]

Since plaintiff is a public figure, in order to recover he must prove with convincing clarity that the AP report was made with actual malice, that is "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* v. *Sullivan, supra* at 279-80. To prove reckless disregard for the truth the Court has stated:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

St. Amant v. *Thompson,* 390 U. S. 727, 731-32 (1968). In meeting this burden due regard must be given to the

[1]The Supreme Court in *Gertz* reiterated that one additional factor which may be considered in analysis of whether a person properly is classified as a public figure is his access to the media to seek correction of any misstatements. 418 U. S. at 344. Here, Mr. Buchanan rapidly sought and obtained corrections from both AP and CBS and later articles described his claims of falsity. These are added indications that Mr. Buchanan should be classified as a public figure.

difficulties involved in contemporary or spot news reporting. *Associated Press* v. *Walker,* 388 U. S. 130, 158-59 (1967).

Plaintiffs urge that they have presented sufficient evidence so that this court must conclude that genuine issues of material fact remain in dispute so that trial on the merits must be had. Plaintiffs take two somewhat inconsistent positions for purposes of this motion. Both positions must be rejected. First, it is the testimony of the AP reporter, Mr. Cohen, that he arrived at the judicial hearing late but heard most of the proceedings. Then Mr. Cohen testified that he talked with the Common Cause attorney, Mr. Guido, and with Leslie Stahl, a CBS reporter, to find out if he had missed anything. Thereafter, he reported the story to AP. AP's office man, Mr. McLeod, has testified that he also checked with the Common Cause attorney by phone in order to verify certain details in the story. Plaintiffs argue that if defendants were present and did, in fact, check out the story, they must have learned that campaign expenditures were involved and that the story was not similar to the Barker case at all. There is a serious flaw in plaintiff's reasoning. They have the burden of proving by clear and convincing evidence that the report was published with actual malice. The evidence just described does not come even close to meeting the actual malice standard. There first of all is no proof that defendants focused on whether the checks involved campaign contributions, campaign expenditures, or something else. It appears undisputed that defendants concentrated on the fact that cash was returned to the campaign committee in a transaction which was similar, at least in this regard, to that involving Mr. Barker.[2] Further, the record is without dispute that almost all the reporters who were present at the hearing

[2]Defendants properly point out that the *Washington Evening Star,* though correctly labeling the transactions as involving expenditures, also compared the cash aspects with those of Mr. Barker. *Washington Evening Star,* May 9, 1973.

were very confused about precisely what was going on. Mr. Guido has testified that he was repeatedly asked questions demonstrating that confusion was widespread. Further, the AP reporter, from the nature of his assignment, was operating under severe time restraints. Given the unshaken testimony of the AP reporters, the lack of evidence that they focused on the distinctions plaintiffs feel are important, and given further the widespread confusion and time restraints, this court concludes as a matter of law that plaintiffs have failed to demonstrate facts upon which they could prove their claim of actual malice with convincing clarity.

Plaintiffs' second position regarding proof of malice is as follows. Defendants would testify without dispute that Mr. Cohen was present at the hearing, that he spoke with Mr. Guido and Ms. Stahl thereafter, and that Mr. McLeod later also spoke with Mr. Guido to clarify certain facts. Defendants would testify that they learned nothing that made them doubt the accuracy or truth of the wire report. Plaintiffs would introduce evidence that Mr. Guido cannot recall whether he spoke with Mr. Cohen or Mr. McLeod after the hearing and that he cannot recall seeing Mr. Cohen at the hearing. Ms. Stahl would testify that she cannot recall seeing Mr. Cohen at the hearing or precisely when she spoke with him after the hearing. Plaintiffs' counsel has proffered further that he cannot recall seeing Mr. Cohen at the hearing. From this evidence plaintiffs aver that there is a factual dispute regarding whether defendant Cohen was present at the hearing and whether Mr. Cohen and/or Mr. McLeod did anything to check the accuracy of the report they filed. Plaintiffs then assert that if the jury found that Cohen was not present at the hearing and that AP did nothing to check the report's accuracy, from these findings the jury may infer actual malice. There are two answers to plaintiffs' contentions. First, in face of

the unshaken testimony of defendants, the mere failure to recall seeing or talking with a person, under the circumstances of this case, does not create a genuine issue of material fact. The courtroom was crowded on the day of the hearing and after the hearing Mr. Guido talked with many reporters. No one has testified that he or she would have recalled Mr. Cohen if he had been there or if he had spoken with him. Indeed, Mr. Guido doubts whether he would recognize Mr. Cohen at all. Under these circumstances plaintiffs cannot prove with clear and convincing evidence that Cohen and McLeod published the report without minimal checking. Second, even if defendants failed to undertake any checking of their sources, then somehow they received information on the story. Perhaps, according to this theory of plaintiffs Cohen got the story from Ms. Stahl when he spoke with her after the hearing. At any rate, finally the AP reporters got the story and published it. Under these circumstances, however, there is no proof that the AP reporters *knew* the story was false. And further, there is *no convincing proof* that the AP conduct constituted reckless disregard for the truth, *i.e.* "that [AP or Cohen] in fact entertained serious doubts as to the truth of [its] publication." *St. Amant* v. *Thompson, supra* at 731-32. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing." *Id.* At most the AP story appears to be one of a number of possible rational interpretations of a confusing hearing. This is insufficient to create a jury issue on malice. *Time, Inc.* v. *Pape,* 401 U. S. 279, 290 (1971).

On this motion for summary judgment the court has undertaken to examine the factual assertions made by the parties to determine whether, taking the assertions in the light most favorable to plaintiffs, plaintiffs could meet their heavy burden of proof on the malice issue. The Court of

Appeals for the District of Columbia Circuit has pointed out that summary judgment procedures are particularly relevant where first amendment issues are present because one of the purposes of that amendment is to protect the press from harassment, not merely from liability. *Washington Post Co.* v. *Keogh,* 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1001 (1967); *accord, Treutler* v. *Meredith Corp.,* 455 F. 2d 255, 257 n. 1 (8th Cir. 1972); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F. 2d 858, 865 (5th Cir. 1970); *Thompson* v. *Evening Star Newspaper Co., supra.* And this Circuit further has urged that in considering a summary judgment motion the court is to look at the factual issues in light of the *Times* standard. "[E]vidence offered in a libel case might be sufficient to raise a jury question as to a publisher's negligence but insufficient to raise one as to his actual malice." *Washington Post Co.* v. *Keogh, supra* at 971; *LaBruzzo* v. *Associated Press,* 353 F. Supp. 979, 982-88 (W. D. Mo. 1973); *Bon Air Hotel, Inc.* v. *Time, Inc., supra* at 866-67; *Time Inc.* v. *McLaney, supra* at 572; *Wasserman* v. *Time, Inc.,* 424 F. 2d 920, 922 (D. C. Cir. 1970), *cert. denied,* 398 U. S. 940 (1970). Under the *Times* standard the court must make an independent examination of the whole record to assure that there has been no intrusion on free expression. *See Greenbelt Cooperative Publishing Ass'n* v. *Bresler,* 398 U. S. 6, 11 (1970). After review of all of the evidence which would be introduced at trial—and the court notes that there has been exhaustive discovery such that the positions of the parties are clearly delineated—there would be no jury issue on malice. In such circumstances summary judgment is appropriate. An appropriate judgment accompanies this Memorandum Opinion.

THOMAS A. FLANNERY
United States District Judge

June 23, 1975
Date

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-323

HENRY M. BUCHANAN and HENRY M. BUCHANAN, C.P.A., P.A.,

Plaintiffs,

v.

ASSOCIATED PRESS and STEVEN COHEN,

Defendants.

JUDGMENT

This matter came before the court on defendants' motion for summary judgment and plaintiffs' opposition thereto. Upon consideration of the memoranda and exhibits submitted by counsel and after oral hearing, and it appearing that there exists no genuine issue of material fact and that defendants are entitled to judgment as a matter of law, and for the reasons stated in the Memorandum Opinion filed with this Judgment, it is by the court this 23rd day of June, 1975

ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be, and the same hereby is, granted; and it is further

ORDERED, ADJUDGED and DECREED that judgment be entered for defendants.

THOMAS A. FLANNERY
United States District Judge